

HARLEMAN MANUFACTURING, LLC,
a Missouri limited liability company,

Plaintiff-Counterdefendant,

v.

PENG0 CORPORATION,
a Delaware corporation,

Defendant-Counterplaintiff,

and

DANA SCUDDER,
a Florida citizen,

Defendant.

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

EXHIBIT 2

Transcript of the Testimony of **Dana Scudder**

Date: January 28, 2015

Case: Harleman v. Pengo
6:14-cv-03498-MDH; USDC



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1 IN THE UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MISSOURI
3 SOUTHERN DIVISION

4 HARLEMAN MANUFACTURING,
5 LLC, a Missouri limited
6 liability company,

7 Plaintiff/Counter Defendant,

8 vs.

9 Case No.
10 6:14-cv-03498-MDH

11 PENG0 CORPORATION, a
12 Delaware corporation,

13 Defendant/Counter Plaintiff

14 and

15 DANA SCUDDER, a
16 Florida citizen.

17 VIDEOTAPED DEPOSITION OF MR. DANA SCUDDER,
18 produced, sworn, and examined on Wednesday,
19 January 28, 2015, at 9:32 a.m. of that day,
20 at the law offices of Taylor, Stafford, Clithero,
21 FitzGerald & Harris, 3315 East Ridgeview Street,
22 Suite 1000, in the City of Springfield, County of
23 Greene, and State of Missouri, before me,
24 PAULA JOHNSON KAVANAGH, CCR, RPR, in the
25 above-captioned cause; taken on behalf of the
26 Plaintiff/Counter Defendant.

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I N D E X

TESTIMONY OF
MR. DANA SCUDDER:

EXAMINATION

BY MR. HARRIS: 5
BY MR. SPERLING: 125
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21	(Exhibits 40 through 76 were attached to the		
22	original deposition transcript, with scans sent to		
23	Mr. Harris and Mr. Sperling.)		
24	Phonetic spellings are signified by: (ph.)		
25	Exactly as stated: (sic)		

<p style="text-align: right;">5</p> <p>1 THE VIDEOGRAPHER: We are on the record at</p> <p>2 9:32.</p> <p>3 You may swear the witness.</p> <p>4 Whereupon,</p> <p>5 MR. DANA SCUDDER,</p> <p>6 Defendant herein, being produced, sworn, and</p> <p>7 examined, testified as follows:</p> <p>8 EXAMINATION</p> <p>9 BY MR. HARRIS:</p> <p>10 Q Would you state your full name, please.</p> <p>11 A Dana Gwinnett Scudder.</p> <p>12 Q And, Mr. Scudder, have you ever had your deposition</p> <p>13 taken before?</p> <p>14 A Yes, I have.</p> <p>15 Q How many times?</p> <p>16 A More than ten.</p> <p>17 Q So you're very familiar with the process?</p> <p>18 A Yes.</p> <p>19 Q All right. I won't go over all my normal ground</p> <p>20 rules, but I'll just have one agreement with you.</p> <p>21 If for some reason you don't understand my question,</p> <p>22 please tell me and I'll rephrase it or explain it</p> <p>23 until we get to where we can understand each other.</p> <p>24 Fair enough?</p> <p>25 A Yes, sir.</p>	<p style="text-align: right;">7</p> <p>1 years. And then that division was sold to a company</p> <p>2 called Time Manufacturing. And I was there about</p> <p>3 ten years.</p> <p>4 Q And with regard to this deposition that we're here</p> <p>5 today about in the case of Harleman Manufacturing</p> <p>6 versus Pengo, what have you done to prepare for this</p> <p>7 deposition?</p> <p>8 A I went back and reviewed the documents that -- that</p> <p>9 we had prepared and presented and also went through</p> <p>10 the documents that we had received from the Harleman</p> <p>11 side. And then met with counsel to go over some</p> <p>12 information.</p> <p>13 Q When you -- well, when did you meet with counsel?</p> <p>14 A Yesterday.</p> <p>15 Q Was anyone present other than your attorneys -- or</p> <p>16 Pengo's attorneys, I should say?</p> <p>17 A No.</p> <p>18 Q Explain to us, Pengo -- what -- what is -- we've</p> <p>19 said "Pengo." What is Pengo?</p> <p>20 A We manufacture augers for the agricultural, utility,</p> <p>21 foundation, and construction industry.</p> <p>22 Q And what -- what is an auger, for those who might</p> <p>23 not know?</p> <p>24 A An auger is used to put a hole in the ground for</p> <p>25 various reasons, primarily for the foundation side</p>
<p style="text-align: right;">6</p> <p>1 Q What's your home address?</p> <p>2 A 132 Saint Pierre Way, Jupiter, Florida 33458.</p> <p>3 Q And what's your date of birth?</p> <p>4 A August 20th, 1963.</p> <p>5 Q And you are employed with Pengo; is that correct?</p> <p>6 A Correct.</p> <p>7 Q What is your position with Pengo?</p> <p>8 A Vice president, sales and marketing.</p> <p>9 Q How long have you been in that position?</p> <p>10 A Around eight years.</p> <p>11 Q And what's your educational background?</p> <p>12 A Some college in sales and marketing with San Jacinto</p> <p>13 University.</p> <p>14 Q No degree?</p> <p>15 A No, sir.</p> <p>16 Q And prior to working for Pengo, what did you do?</p> <p>17 A Essentially I've done the same thing my whole</p> <p>18 career, either being involved in the equipment sales</p> <p>19 and/or auger manufacturing.</p> <p>20 Q Who did you work for before Pengo?</p> <p>21 A I started originally with a company called</p> <p>22 Mobile Equipment in Houston, Texas. I was there</p> <p>23 around ten years.</p> <p>24 And then went to a company called</p> <p>25 Reedrill Texoma. And I was there for about eight</p>	<p style="text-align: right;">8</p> <p>1 on -- for buildings, such as this, on providing</p> <p>2 solid bases to build buildings, bridges, roads,</p> <p>3 things along that line.</p> <p>4 Q How -- generally, how large a company is Pengo? How</p> <p>5 would you measure the size of Pengo?</p> <p>6 A From a --</p> <p>7 Q Well, let's break it down. How many employees does</p> <p>8 Pengo have?</p> <p>9 A A hundred plus. It varies.</p> <p>10 Q And as far as annual sales, does -- is that a</p> <p>11 statistic that you publish regularly?</p> <p>12 A Not publicly, no.</p> <p>13 Q All right. How is -- in the marketplace in which</p> <p>14 Pengo operates, there are many competitors. Would</p> <p>15 that be a fair statement?</p> <p>16 A Yes, sir.</p> <p>17 Q Do you consider Harleman Manufacturing to be a</p> <p>18 competitor?</p> <p>19 A Yes, sir.</p> <p>20 Q Can you give me an idea of where Pengo ranks as far</p> <p>21 as sales volume in the auger industry? Is it No. 1,</p> <p>22 No. 2, or do you know?</p> <p>23 A It varies by markets. As I said, we cover four</p> <p>24 distinct markets, and our market share varies in</p> <p>25 each one of those markets.</p>

<p style="text-align: right;">9</p> <p>1 Q How about in the utility market?</p> <p>2 A I would say that we are the market leader in the</p> <p>3 utility market segment.</p> <p>4 Q How about agriculture?</p> <p>5 A There as well.</p> <p>6 Q Construction?</p> <p>7 A Probably middle of the pack.</p> <p>8 Q And what was the fourth one?</p> <p>9 A Foundation.</p> <p>10 Q All right. Where are you at there?</p> <p>11 A Probably -- about the same. About middle of the</p> <p>12 pack.</p> <p>13 Q Now, where are Pengo's corporate offices located?</p> <p>14 A In Laurens, Iowa.</p> <p>15 Q And can you give us an idea of where that's at in</p> <p>16 relation to, say, Des Moines or --</p> <p>17 A It's in northwest Iowa. It's near Spencer,</p> <p>18 Storm Lake are the two biggest towns. It's about</p> <p>19 three hours from Des Moines, about three hours from</p> <p>20 Omaha, depending on.</p> <p>21 Q Now, back in 2008/2009, was Pengo the market leader</p> <p>22 in utility augers?</p> <p>23 A I would say yes.</p> <p>24 Q And would that also be true of agricultural back</p> <p>25 then?</p>	<p style="text-align: right;">11</p> <p>1 Q Approximately how many people do you supervise?</p> <p>2 A Thirteen.</p> <p>3 Q Now, there's some people's names that we have in the</p> <p>4 documents, and I just kind of want to figure out the</p> <p>5 pecking order at Pengo and whether or not you</p> <p>6 supervised them. A gentleman by the name of</p> <p>7 Jim Tomlen, was he under your supervision?</p> <p>8 A Yes, sir, he was.</p> <p>9 Q Mary Pohlman?</p> <p>10 A Yes, sir.</p> <p>11 Q Eric Matthias?</p> <p>12 A No, sir.</p> <p>13 Q Now, I know -- is he in engineering?</p> <p>14 A Yes, sir, he's director of engineering.</p> <p>15 Q Did he also report to Mr. Rickards?</p> <p>16 A Yes, sir.</p> <p>17 Q And then Dawn Jamison?</p> <p>18 A Works for me.</p> <p>19 Q And then there's another gentleman. Is it Hemerick?</p> <p>20 A Hennarichs.</p> <p>21 Q Hennarichs?</p> <p>22 A And he worked for me as well.</p> <p>23 Q Okay. Now, you were present for Mr. Harleman's</p> <p>24 deposition when it was taken in this case by Pengo's</p> <p>25 attorney; correct?</p>
<p style="text-align: right;">10</p> <p>1 A Yes.</p> <p>2 Q Do you have any idea -- did you do any kind of</p> <p>3 customer satisfaction surveys or anything like that</p> <p>4 back at that time to -- to determine what the</p> <p>5 perception of Pengo was by its customers?</p> <p>6 A We did not, no.</p> <p>7 Q Did you have a general knowledge of what Pengo's</p> <p>8 perception was in the utility and agricultural</p> <p>9 industry back in 2008/2009?</p> <p>10 A Yes.</p> <p>11 Q What would that be?</p> <p>12 A From a -- I need a little more specific on...</p> <p>13 Q Well, I mean, did people think Pengo's products were</p> <p>14 good? Did they think they were bad? Did you have a</p> <p>15 good reputation, a bad reputation, back in that time</p> <p>16 frame?</p> <p>17 A We had a good -- a good reputation in the industry</p> <p>18 across all market segments.</p> <p>19 Q Now, who is your immediate supervisor at Pengo?</p> <p>20 A Brian Rickards.</p> <p>21 Q And what is his position with the company?</p> <p>22 A Vice president and general manager.</p> <p>23 Q Now, in your position as vice president of sales, do</p> <p>24 you have people in which you supervise?</p> <p>25 A Yes, sir.</p>	<p style="text-align: right;">12</p> <p>1 A Yes, sir, I was.</p> <p>2 Q And I'm going to ask you a general question, and</p> <p>3 we'll see what you say about it, but as you sit here</p> <p>4 today, reflecting back on Mr. Harleman's deposition,</p> <p>5 do you recall things that he said that you just</p> <p>6 thought were completely inaccurate or incorrect?</p> <p>7 MR. SPERLING: Objection, ambiguous.</p> <p>8 A There were things that were different, yes.</p> <p>9 Q (By Mr. Harris) Could -- I mean, did you keep any</p> <p>10 kind of list of those or document them in any way?</p> <p>11 A I did at the time. But I didn't keep a list, but...</p> <p>12 Q All right. Now, how did you first become aware of</p> <p>13 Harleman Manufacturing?</p> <p>14 A I had heard the name in the industry before, but the</p> <p>15 first time that I had any real knowledge of</p> <p>16 Harleman Manufacturing was when I was approached</p> <p>17 by -- at that time Eric Hennarichs was our product</p> <p>18 manager for helicoid and flights, and he had</p> <p>19 approached me about making a visit to be able to</p> <p>20 sell Harleman Manufacturing the sectional lighting.</p> <p>21 Q And is this something he wanted to do or he wanted</p> <p>22 you to go with him?</p> <p>23 A He wanted me to go with him. That's my job to</p> <p>24 support the field guys.</p> <p>25 Q Do you recall when that was?</p>

<p style="text-align: right;">13</p> <p>1 A I don't have a specific date on it, but it was 2 around that '08 time frame. 3 Q And would that be the first time that you ever met 4 Ron Harleman when you and he went to meet 5 Mr. Harleman? 6 A I believe so, yes. 7 Q And that occurred at Harleman's facilities in 8 El Dorado Springs? 9 A Correct. 10 Q And do you recall -- I think Mr. Harleman's 11 testimony was that that was in the fall of 2007. 12 Does that sound right to you? 13 A That could be accurate, yes. 14 Q Now, do you recall had you been -- prior to visiting 15 Mr. Harleman -- to Westar Energy on that trip? 16 A Not on that trip, but I have been there many times, 17 yes. 18 Q Do you ever recall being at Westar Energy when they 19 told you that they were using the Harleman auger 20 heads? 21 A I do, yes. 22 Q And then was it after that that you visited 23 Mr. Harleman's facility? 24 A Possibly. I don't recall. I had many visits to 25 Westar.</p>	<p style="text-align: right;">15</p> <p>1 Harleman auger head? 2 A No, I would not agree with that statement. 3 Q Okay. Why not? 4 A At that point in time, we had had discussions about 5 doing cast head augers for Harleman. And I was 6 asked if we could send some samples down to 7 Harleman. And I checked the inventory on what we 8 had the most quantity of on two different sizes -- 9 which I couldn't even tell you today what those 10 were -- but we shipped two auger heads down to 11 Harleman for them to see what our cast heads looked 12 like as part of our proposal to be able to cast his 13 heads on a spiral design. So it was kind of some 14 samples as a comparison to show what our 15 capabilities were. 16 Q How did it come about that you ended up at the 17 Harleman ranch? 18 A They took the cast heads and built them up as 19 augers. And at that time, I can't remember if it 20 was Eric Hennarichs or Jim Tomlen. They both 21 handled the account. There was some transfer. 22 During that time frame, I changed positions with the 23 sales team. So we went from product managers to 24 territory managers. Jim Tomlen lived in 25 Kansas City, so he had the Harleman account at that</p>
<p style="text-align: right;">14</p> <p>1 Q On the first visit that you had at Mr. Harleman's 2 facility, did you talk with him about his auger 3 heads? 4 A Didn't have any specific conversations. I was there 5 to talk about the flighting and the parts business. 6 I don't know if that came up in conversation. I 7 don't recall. 8 Q Do you recall a visit to the Harleman facility when 9 you viewed a video that Mr. Harleman had comparing 10 one of his augers to a Pengo auger? 11 A No. 12 Q You don't recall that ever occurring? 13 A No. I saw many videos, but not -- not a comparison 14 video. 15 Q Prior to going to visit Mr. Harleman's facility for 16 the first time, had you done any research on any of 17 his augers? 18 A No, sir. 19 Q Now, you agree with me that there was an occasion 20 when you and some other individuals from Pengo went 21 to Mr. Harleman's ranch? 22 A Yes, sir. 23 Q And at that meeting at Mr. Harleman's ranch, there 24 was, for lack of a better word, a drilling 25 competition between a Pengo auger head and a</p>	<p style="text-align: right;">16</p> <p>1 time. 2 Anyway, between one of the two, let us know 3 that they had built the augers up and wanted us to 4 come down and take a look at them. So we went down, 5 had a meeting at the Harleman facility. They took 6 the Pengo augers, put them on a truck, and we took 7 them out to an area on some land that Ron had that 8 had some tough rock, drilling rock. And at that 9 point we drilled with the Pengo tools. 10 And a short time later, after we were finished, 11 then the truck came back again, and it had Harleman 12 augers on it. And at that point, the Harleman 13 augers were -- were drilled. 14 Q Was there ever occasion when they were drilling side 15 by side? 16 A No. We drilled with the Pengo augers and then put 17 the Harleman augers on and drilled down. We didn't 18 go too far, but... 19 Q Did you have people there from Pengo who were 20 videotaping it? 21 A No. No one from Pengo was videotaping. 22 Q You agree that Mr. Harleman had someone there 23 videotaping? 24 A Yes, I do. 25 Q And you've seen that video?</p>

<p style="text-align: right;">17</p> <p>1 A I have seen some of it, yes.</p> <p>2 Q Did you review it in preparation for this</p> <p>3 deposition?</p> <p>4 A No, I did not.</p> <p>5 Q But it's your recollection from reviewing that</p> <p>6 video, there's never an occasion when there are two</p> <p>7 what I would call bobcats drilling side by side?</p> <p>8 A No, there was only one machine on site.</p> <p>9 Q So is it your testimony you had no understanding</p> <p>10 that the augers that -- that Pengo had sent down to</p> <p>11 Harleman were going to be used for drilling?</p> <p>12 A No. I sent the heads down as samples. And if we</p> <p>13 were going to do a drill-off, I wouldn't have sent</p> <p>14 those augers for that drill-off.</p> <p>15 Q Okay. Which -- which ones did you send?</p> <p>16 A I sent two cast head augers.</p> <p>17 Q Do you recall what model they were?</p> <p>18 A I know they're double cut cast heads. But I don't</p> <p>19 know specifically which ones that we sent down.</p> <p>20 Q Which ones would you have sent down?</p> <p>21 A Well, we have seven different diameters, and then we</p> <p>22 also have them available -- actually, I guess 14</p> <p>23 because we have them in dirt and rock. So I'm not</p> <p>24 sure if we sent one rock and one dirt or if we sent</p> <p>25 two rock heads down.</p>	<p style="text-align: right;">19</p> <p>1 A Brian Rickards, Jim Tomlen, and I'm not certain</p> <p>2 about Mary Pohlman or Eric Hennarichs. I just don't</p> <p>3 recall, but they could have been there.</p> <p>4 THE VIDEOGRAPHER: Excuse me. Could we go off</p> <p>5 the record for a second.</p> <p>6 MR. HARRIS: Sure.</p> <p>7 THE VIDEOGRAPHER: Okay. We're off the record.</p> <p>8 (Discussion was held off the record.)</p> <p>9 THE VIDEOGRAPHER: Okay. We're back on the</p> <p>10 record.</p> <p>11 Q (By Mr. Harris) What was the end result of the --</p> <p>12 the meeting at the ranch?</p> <p>13 A We had an agreement in place already on the</p> <p>14 fighting that we were supplying. And the agreement</p> <p>15 was that we would move forward on putting together</p> <p>16 pricing for the cast head design for Harleman</p> <p>17 Manufacturing.</p> <p>18 Q Now, at any point when you were there at the ranch</p> <p>19 and they were using the Pengo auger, did you make</p> <p>20 any kind of statement about, Hey, that auger is not</p> <p>21 designed to do that kind of drilling?</p> <p>22 A No, I did not.</p> <p>23 Q What was the next step in -- in the process of</p> <p>24 putting together this agreement?</p> <p>25 A Harleman was going to build up the weldments for the</p>
<p style="text-align: right;">18</p> <p>1 Q Okay.</p> <p>2 A But again, the purpose was just to illustrate our</p> <p>3 capabilities on producing cast heads.</p> <p>4 Q But you can't say which ones you would have sent</p> <p>5 down if you knew there was going to be a test?</p> <p>6 A If I was doing a test against a Harleman auger, I</p> <p>7 wouldn't have sent a cast head.</p> <p>8 Q Why is that?</p> <p>9 A Because we had multiple -- excuse me -- multiple</p> <p>10 other auger designs, and I would have sent something</p> <p>11 comparable to a spiral-type design auger.</p> <p>12 Q But you can't, as you sit here today, say what it</p> <p>13 would have been?</p> <p>14 A Oh, I would have sent our spiral design rock auger.</p> <p>15 Q Does it have a name?</p> <p>16 A No, it's just our spiral.</p> <p>17 Q Is that the Rock Ripper?</p> <p>18 A No. That's a separate rock auger.</p> <p>19 Q Is the Rock Ripper a spiral design?</p> <p>20 A It is not. It's a "S" pattern flat bottom.</p> <p>21 Q At any point when you were there, did you ask</p> <p>22 Mr. Harleman or his people to stop videoing?</p> <p>23 A I did not, no.</p> <p>24 Q Who all -- in addition to you, who else was present</p> <p>25 from Pengo?</p>	<p style="text-align: right;">20</p> <p>1 spiral design heads that they manufacture and send</p> <p>2 to Pengo, for lack of a better term, for reverse</p> <p>3 engineering to produce drawings.</p> <p>4 Q Prior to that, did you ever have a phone call with</p> <p>5 Mr. Harleman when you inquired about obtaining a</p> <p>6 licensing agreement for the Pengo -- or I'm sorry,</p> <p>7 for the Harleman head?</p> <p>8 A At one point we had some what I would call generic</p> <p>9 conversations on kind of a joint venture of going to</p> <p>10 market together for different products.</p> <p>11 Q And what was the result of those conversations?</p> <p>12 A The end result was we ultimately decided not to go</p> <p>13 that direction.</p> <p>14 Q Now, did you ever have a conversation with Mr. --</p> <p>15 with Mr. Harleman where you talked about a visit or</p> <p>16 a phone call you'd had from Keys Electric, a power</p> <p>17 company in Florida?</p> <p>18 A Yes, I do.</p> <p>19 Q What was the nature of that conversation?</p> <p>20 A Basically, the conversation was to pay a compliment</p> <p>21 to Harleman Manufacturing. I was down on a job</p> <p>22 site. They were having some trouble drilling some</p> <p>23 tough coral. They had been using a Terex product,</p> <p>24 and they bought a Harleman -- Harleman auger and it</p> <p>25 resolved their problems. And I let him know that</p>

<p style="text-align: right;">21</p> <p>1 that was the case.</p> <p>2 Q Then did you make another trip after that phone call</p> <p>3 to the Harleman facility?</p> <p>4 A At some point, yes.</p> <p>5 Q And what was the purpose of that trip?</p> <p>6 A That visit was when we were getting closer to having</p> <p>7 everything put together and essentially just did a</p> <p>8 review on what we were getting prepared to present</p> <p>9 to Harleman.</p> <p>10 Q And is that -- during that meeting, did you propose</p> <p>11 that Pengo would buy auger heads from Harleman?</p> <p>12 A No. We had some, again, generic discussions about</p> <p>13 the possibility of doing something along those</p> <p>14 lines. But again, ultimately decided not to go that</p> <p>15 direction.</p> <p>16 Q You would agree with me, wouldn't you, though, that</p> <p>17 at the time you put this deal together with Harleman</p> <p>18 that the intent was that Pengo was going to purchase</p> <p>19 heads from Harleman?</p> <p>20 A No. There's two separate discussions that we had.</p> <p>21 One for us being able to provide cast heads to</p> <p>22 Harleman, and the other discussion was the</p> <p>23 possibility of our two companies doing business</p> <p>24 together in some shape or fashion.</p> <p>25 Q They were never part of the same discussion?</p>	<p style="text-align: right;">23</p> <p>1 casting.</p> <p>2 Q And I think the price that you came up with was</p> <p>3 \$43,000?</p> <p>4 A Yeah. I'm not sure if it was exactly 43, but in</p> <p>5 that ballpark, yes, sir.</p> <p>6 Q And what was that to cover?</p> <p>7 A That was the cost to produce all the different molds</p> <p>8 for the cast products.</p> <p>9 Q Do you recall how much Pengo actually spent to</p> <p>10 produce the cast molds, the tooling?</p> <p>11 A Not specifically, no.</p> <p>12 Q And then I assume there was some engineering time</p> <p>13 that was factored into that \$43,000 number?</p> <p>14 A No, sir. That was part of the overhead cost.</p> <p>15 Q Do you know how much in engineering time Pengo spent</p> <p>16 coming up with the castings?</p> <p>17 A We estimated around 100-plus hours.</p> <p>18 Q At what rate?</p> <p>19 A I don't know the rate.</p> <p>20 Q And the idea was that Pengo would sell these auger</p> <p>21 heads once they were cast to Harleman?</p> <p>22 A To only Harleman, correct.</p> <p>23 Q And it was only Harleman because Mr. Harleman had a</p> <p>24 patent on his auger head?</p> <p>25 MR. SPERLING: Objection to the extent the</p>
<p style="text-align: right;">22</p> <p>1 A No, never. Two completely separate.</p> <p>2 Q Never part of the same agreement?</p> <p>3 A No.</p> <p>4 Q You never drafted an agreement or a proposed</p> <p>5 agreement whereby Pengo would pay a percentage</p> <p>6 royalty to Harleman for purchasing his heads?</p> <p>7 A No.</p> <p>8 Q At any point in time during any of your meetings</p> <p>9 with Mr. Harleman, did you ever say that Pengo would</p> <p>10 be interested in buying twenty-five to 3,500 auger</p> <p>11 heads per year from Harleman?</p> <p>12 A No.</p> <p>13 Q Now, at some point, you did provide Mr. Harleman</p> <p>14 pricing for Pengo to cast his auger heads?</p> <p>15 A Yes, sir.</p> <p>16 Q And you also priced what we call "tooling"; is that</p> <p>17 correct?</p> <p>18 A Yes, sir.</p> <p>19 Q And tell us what "tooling" is so that the ladies and</p> <p>20 gentlemen of the jury who might view this video</p> <p>21 would understand what we're talking about.</p> <p>22 A The tooling is what's used to make the actual</p> <p>23 casting. So it's much like a -- like a candle mold,</p> <p>24 where you have that -- they pour the hot liquid in,</p> <p>25 it forms, and you end up with the end result</p>	<p style="text-align: right;">24</p> <p>1 question calls for a legal conclusion.</p> <p>2 Q (By Mr. Harris) You can go ahead and answer, if you</p> <p>3 can.</p> <p>4 A Yeah, our agreement was to sell just to Harleman.</p> <p>5 It was their product. We were building it for them,</p> <p>6 which we do for many other customers.</p> <p>7 Q And you were aware that there was a patent that</p> <p>8 Mr. Harleman had; correct?</p> <p>9 A Yes.</p> <p>10 Q And as part of this process, you obtained that</p> <p>11 patent and reviewed it?</p> <p>12 A I have seen it, yes.</p> <p>13 Q What was the purpose of obtaining the patent and</p> <p>14 reviewing it?</p> <p>15 A At the time I just wanted to see exactly what was</p> <p>16 patented. So just because you have a patent, you</p> <p>17 know, on a cup, I mean, you could have a patent on a</p> <p>18 handle or you could have a patent because it's a</p> <p>19 flat bottom. I was curious what he had patented on</p> <p>20 that particular tool.</p> <p>21 Q And what was your understanding of what he had a</p> <p>22 patent on?</p> <p>23 A From what I recall, it was on the layout of the</p> <p>24 tooth and the percussion style drill pattern that it</p> <p>25 produced.</p>

<p style="text-align: right;">25</p> <p>1 Q Now, Pengo is set to make a profit on each head that</p> <p>2 it sold Harleman?</p> <p>3 MR. SPERLING: Would you read the question</p> <p>4 back, please?</p> <p>5 (The requested portion of the record was</p> <p>6 read by the reporter.)</p> <p>7 MR. SPERLING: Object to the term "set" as</p> <p>8 ambiguous.</p> <p>9 Q (By Mr. Harris) Well, let me rephrase the question</p> <p>10 for you. You developed pricing for Mr. Harleman's</p> <p>11 company for these auger heads that you were going to</p> <p>12 build; correct?</p> <p>13 A Yes, sir.</p> <p>14 Q And as part of that pricing, you included a profit</p> <p>15 margin for Pengo?</p> <p>16 A Yes, sir.</p> <p>17 Q Do you recall what that profit margin was?</p> <p>18 A I don't remember where it ended up. And the reason</p> <p>19 being is during this process, we ended up changing</p> <p>20 suppliers. So we actually had a price increase when</p> <p>21 we made that change of suppliers, and we elected to</p> <p>22 take the price increase ourself and not pass it onto</p> <p>23 Harleman and keep their pricing the same. So I</p> <p>24 couldn't tell you exactly where our margins ended</p> <p>25 up.</p>	<p style="text-align: right;">27</p> <p>1 A We had discussions on it because the tooling cost is</p> <p>2 based on whether we're going to pay for it or the</p> <p>3 customer's going to pay for it, so that factors in,</p> <p>4 you know, the overall pricing. So once it was</p> <p>5 decided that Harleman was going to pay for the</p> <p>6 tooling, then we took our tooling cost and put a</p> <p>7 small markup on that from a carrying cost standpoint</p> <p>8 and presented those numbers to Harleman.</p> <p>9 Q Now, before there was any written agreement entered</p> <p>10 into, Harleman Manufacturing built some heads to</p> <p>11 send to Pengo for reverse engineering; true?</p> <p>12 A I'm not sure of the -- of the time frame of -- if it</p> <p>13 was before or after the agreement was signed, so...</p> <p>14 Q Would you -- would you agree with me that Harleman</p> <p>15 shipped some of its heads to Pengo to be reverse</p> <p>16 engineered in December of 2009?</p> <p>17 A I just don't know.</p> <p>18 Q Okay.</p> <p>19 MR. SPERLING: Let's take a break for a moment.</p> <p>20 MR. HARRIS: Okay.</p> <p>21 THE VIDEOGRAPHER: Okay. We're off the record.</p> <p>22 (Short break taken.)</p> <p>23 (Exhibit 40 was marked for</p> <p>24 identification.)</p> <p>25 THE VIDEOGRAPHER: Okay. We're back on the</p>
<p style="text-align: right;">26</p> <p>1 Q But the original profit margin you built in, would</p> <p>2 you agree with me, was 47 percent?</p> <p>3 A No, sir, I would not.</p> <p>4 Q And Pengo did ultimately sell some heads to Harleman</p> <p>5 as a result of the casting; correct?</p> <p>6 A Yes, sir, we did.</p> <p>7 Q Do you recall how many heads they sold to</p> <p>8 Harleman Manufacturing?</p> <p>9 A No, I don't know that number.</p> <p>10 Q Do you know the total dollar sales to Harleman for</p> <p>11 the auger heads?</p> <p>12 A I don't know the exact number, no.</p> <p>13 Q Do you have an approximate number?</p> <p>14 A Maybe a hundred thousand.</p> <p>15 Q Did Pengo make profit on those sales?</p> <p>16 A Yes, we did.</p> <p>17 Q Do you know how much total profit you made off the</p> <p>18 sales to Harleman of the auger heads?</p> <p>19 A No, sir, I do not.</p> <p>20 Q Now, during your negotiations with Mr. Harleman, was</p> <p>21 there a discussion about who was going to pay the</p> <p>22 \$43,000 for the tooling?</p> <p>23 A Yes, sir, there was.</p> <p>24 Q And how -- what was the nature of the negotiations</p> <p>25 regarding who was going to pay for the tooling?</p>	<p style="text-align: right;">28</p> <p>1 record.</p> <p>2 Q (By Mr. Harris) Mr. Scudder, we're back on the</p> <p>3 record after we took a break, and you met with your</p> <p>4 attorney. I know we were talking about the tooling.</p> <p>5 You said that there was a small markup on the</p> <p>6 tooling that Pengo included in that. Do you recall</p> <p>7 what that markup was?</p> <p>8 A I do not recall the exact percentage.</p> <p>9 Q Approximate percentage?</p> <p>10 A 20 percent.</p> <p>11 Q And then you also said that there were other</p> <p>12 companies that Pengo casted heads for. Back at this</p> <p>13 time frame of 2009, who else do you recall that you</p> <p>14 were casting heads for?</p> <p>15 A Actually, I didn't say cast heads. I said other</p> <p>16 cast products. The only other cast heads that we</p> <p>17 produced were double cut, double carry cast heads</p> <p>18 for Pengo use.</p> <p>19 Q Why was Pengo willing to cast heads for a</p> <p>20 competitor?</p> <p>21 A We do business with several different competitors on</p> <p>22 the parts side as well as the helicoid and sectional</p> <p>23 flight side.</p> <p>24 Q Okay. But why would you be willing to do it on the</p> <p>25 head side?</p>

<p style="text-align: right;">29</p> <p>1 A Because we had the capabilities for the cast</p> <p>2 products. We bring a lot of cast products in and</p> <p>3 felt that could be an opportunity for Pengo to</p> <p>4 supply product and make a product margin on it.</p> <p>5 Q In other words, make a profit?</p> <p>6 A Make a profit.</p> <p>7 Q Now, I was asking you, I think before the break,</p> <p>8 about whether or not Harleman had heads ready to</p> <p>9 ship by December 1st of 2009, and you couldn't</p> <p>10 recall. I want to show you a document that I've</p> <p>11 marked as Exhibit 40. It's labeled Pengo 147. Is</p> <p>12 that an e-mail from you to Brian Rickards dated</p> <p>13 December 1 of 2009?</p> <p>14 A Yes, sir, it is.</p> <p>15 Q And you authored that e-mail?</p> <p>16 A Yes, sir, I did.</p> <p>17 Q And in that it says that "Ron has heads ready to</p> <p>18 ship to us for casting"?</p> <p>19 A Yes, sir, it does.</p> <p>20 Q So after seeing that, would you agree with me that</p> <p>21 Mr. Harleman had the heads ready to ship to Pengo by</p> <p>22 December 1st of 2009?</p> <p>23 A Yes, I would agree.</p> <p>24 Q And in that e-mail, he's requesting that Pengo sign</p> <p>25 a confidentiality agreement; is that correct?</p>	<p style="text-align: right;">31</p> <p>1 marked as Exhibit 41. And that's an e-mail. It</p> <p>2 appears to be from you to Eric Matthias -- is it</p> <p>3 Matthias?</p> <p>4 A Matthias, yes.</p> <p>5 Q Dated Friday, January 8th, 2010, saying, "FYI, the</p> <p>6 Harleman heads shipped out today to Laurens. 10</p> <p>7 complete weldments"; correct?</p> <p>8 A Yes.</p> <p>9 Q So after viewing that, you would agree with me the</p> <p>10 heads shipped January 8th, 2010?</p> <p>11 A Yes.</p> <p>12 Q And that's the same day that nondisclosure agreement</p> <p>13 was signed?</p> <p>14 A Yes.</p> <p>15 Q Now, as far as this project was concerned, what kind</p> <p>16 of priority did you place on it?</p> <p>17 A It would be our standard priority with the exception</p> <p>18 of the engineering time to produce the drawings for</p> <p>19 the tooling from China.</p> <p>20 Q And so I guess the way to say that is: You treated</p> <p>21 it like any other business deal. You didn't make it</p> <p>22 high priority or low priority. It was just standard</p> <p>23 business?</p> <p>24 A It was higher priority, but certainly it fell into</p> <p>25 our standard way of doing business.</p>
<p style="text-align: right;">30</p> <p>1 You're relaying -- you're -- excuse me -- you're</p> <p>2 relaying that to Mr. Rickards?</p> <p>3 A I am, yes.</p> <p>4 Q And then I think what we previously marked in</p> <p>5 Mr. Harleman's deposition as Exhibit 2 is a copy of</p> <p>6 the Confidentiality Agreement that was actually</p> <p>7 signed?</p> <p>8 A Yes, it is.</p> <p>9 Q And that's dated January the 8th of 2010; is that</p> <p>10 correct?</p> <p>11 A That is correct.</p> <p>12 Q And that was signed by Mr. Rickards on behalf of</p> <p>13 Pengo Corporation?</p> <p>14 A That's correct.</p> <p>15 Q And that form was a standard Pengo Nondisclosure</p> <p>16 Agreement; is that right?</p> <p>17 A That's correct.</p> <p>18 Q And then after that agreement was signed,</p> <p>19 Mr. Harleman's company sent the heads to Pengo for</p> <p>20 reverse engineering; is that correct?</p> <p>21 A I don't recall the exact date when Harleman shipped</p> <p>22 the heads to Pengo.</p> <p>23 (Exhibit 41 was marked for</p> <p>24 identification.)</p> <p>25 Q (By Mr. Harris) All right. I'll show you what we've</p>	<p style="text-align: right;">32</p> <p>1 So like the e-mail that you -- on this document</p> <p>2 you presented for 41, I'm explaining to Eric that</p> <p>3 I'll call him to discuss the time line and telling</p> <p>4 Jim he needs to take the lead role. So putting the</p> <p>5 assignments out there for everybody to be able to</p> <p>6 tackle this project.</p> <p>7 Q And I think you previously told me Mr. Matthias is</p> <p>8 the director of engineering?</p> <p>9 A That's correct.</p> <p>10 Q And then Jim Tomlen was the sales representative for</p> <p>11 the region where Mr. Harleman's plant was located?</p> <p>12 A That's correct.</p> <p>13 Q And in that e-mail, you state that you want Jim to</p> <p>14 take the lead role from here; correct?</p> <p>15 A Correct.</p> <p>16 Q So you're -- would it be correct to say you were</p> <p>17 turning the project over to him?</p> <p>18 A Correct.</p> <p>19 Q And what was his title at that time?</p> <p>20 A He would -- southern territory manager.</p> <p>21 Q And I assume that meant he would call on a group of</p> <p>22 customers in a geographic area. Would that be</p> <p>23 correct?</p> <p>24 A Correct.</p> <p>25 Q How big was his geographic area? Do you recall?</p>

<p style="text-align: right;">33</p> <p>1 A Eight states, roughly.</p> <p>2 Q And then how did it work? Did he have to bring --</p> <p>3 did he have to present every deal to you for</p> <p>4 approval, or could he enter into deals on his own?</p> <p>5 How did that work?</p> <p>6 A Any standard deal, the territory managers have the</p> <p>7 authority to put together. Anything nonstandard</p> <p>8 would go through me.</p> <p>9 Q Would this be a standard or a nonstandard deal with</p> <p>10 Harleman Manufacturing?</p> <p>11 A It would be a nonstandard type of...</p> <p>12 Q Now, for -- to contrast, you also sold what we call</p> <p>13 flight material to Harleman; correct?</p> <p>14 A Correct.</p> <p>15 Q That was just -- that was pretty much a standard</p> <p>16 deal?</p> <p>17 A Yes.</p> <p>18 Q Now, is Mr. Tomlen still with Pengo?</p> <p>19 A No. He retired two years ago, I believe, maybe</p> <p>20 three years.</p> <p>21 Q Do you know how long it took Pengo to do the reverse</p> <p>22 engineering?</p> <p>23 A I don't know the exact days, no.</p> <p>24 Q What -- what would be typical, do you know, for</p> <p>25 something like this?</p>	<p style="text-align: right;">35</p> <p>1 A No, it was not me.</p> <p>2 Q And just so you know, I'm trying to shorten things</p> <p>3 up for you.</p> <p>4 A Oh, sure.</p> <p>5 Q As far as which foundry went -- or who did the</p> <p>6 production and what went to the foundries, the</p> <p>7 discussions with the foundries, those types of</p> <p>8 things, you didn't have any direct involvement in</p> <p>9 any of that? Would that be a fair statement on this</p> <p>10 Harleman project?</p> <p>11 A That's correct.</p> <p>12 Q Now, at this time, were you aware that Pengo was</p> <p>13 having some heads casted by another company?</p> <p>14 A Say that again.</p> <p>15 Q When you were doing this deal with Harleman</p> <p>16 Manufacturing, did Ron Harleman make you aware that</p> <p>17 he was having some heads cast by another company?</p> <p>18 MR. SPERLING: Your prior question was Pengo, I</p> <p>19 think.</p> <p>20 Q (By Mr. Harris) I'm sorry. That's a bad -- bad</p> <p>21 question. You were good to question me.</p> <p>22 And I'll start over again. During the time in</p> <p>23 January of 2010, December of 2009, when this process</p> <p>24 was developing, did Mr. Harleman make you aware that</p> <p>25 Harleman Manufacturing was having some of its heads</p>
<p style="text-align: right;">34</p> <p>1 A There is no typical because we've actually never</p> <p>2 done the reverse engineering side of it prior to</p> <p>3 this.</p> <p>4 Q And as far as all the reverse engineering was</p> <p>5 concerned, was that handled by Mr. Matthias?</p> <p>6 A It was all handled through our engineering group,</p> <p>7 yes.</p> <p>8 Q Do you get involved in engineering at all?</p> <p>9 A I do sometimes, yes.</p> <p>10 Q Did you get -- do you recall did you get involved in</p> <p>11 the engineering aspects of the project for Harleman</p> <p>12 with regard to the heads?</p> <p>13 A No, not from the design standpoint.</p> <p>14 Q And as far as choosing the supplier who was going to</p> <p>15 manufacture the heads, did you -- did you do that,</p> <p>16 or was that Mr. Matthias? Or do you recall who did</p> <p>17 that within Pengo?</p> <p>18 A We have a separate division within our group called</p> <p>19 GST, which is our global sourcing team. They</p> <p>20 ultimately, then, make the decision on which foundry</p> <p>21 that we go to based on product capacity.</p> <p>22 Q Do you know who ultimately made that decision in</p> <p>23 this case?</p> <p>24 A I do not.</p> <p>25 Q It wasn't you, though?</p>	<p style="text-align: right;">36</p> <p>1 cast by another company?</p> <p>2 A I was made aware of that. I'm not positive on the</p> <p>3 time frame.</p> <p>4 Q All right. Now, we had -- we had mentioned earlier</p> <p>5 or I had asked the question about whether there was</p> <p>6 any desire on the part of Pengo to use the Harleman</p> <p>7 heads that were going to be cast. And you said that</p> <p>8 wasn't part of the discussion; is that correct?</p> <p>9 A That's correct.</p> <p>10 (Exhibit 42 was marked for</p> <p>11 identification.)</p> <p>12 Q (By Mr. Harris) I'll show you what we've marked as</p> <p>13 Exhibit 42, which is a e-mail chain. And it starts</p> <p>14 at the bottom, I think, with an e-mail from</p> <p>15 Eric Matthias dated March 17th, 2010, to</p> <p>16 James Tomlen. And it appears that you were copied</p> <p>17 on the e-mail. It's dated March 17th, and</p> <p>18 Mr. Matthias states that as of that date, all of the</p> <p>19 Harleman items have been reverse engineered;</p> <p>20 correct?</p> <p>21 A Correct.</p> <p>22 Q And they were submitted to GST, which you said is a</p> <p>23 division of your parent company; is that right?</p> <p>24 A A division of our company.</p> <p>25 Q And they were submitted for quote; is that correct?</p>

<p style="text-align: right;">37</p> <p>1 A Correct.</p> <p>2 Q That's what it says?</p> <p>3 And in the final -- or not the final but the</p> <p>4 second to the last paragraph, Mr. Matthias states</p> <p>5 he's about two weeks ahead of schedule on this</p> <p>6 project, and he hasn't heard anything about an</p> <p>7 agreement between Pengo and Harleman. And then he</p> <p>8 mentions in there "i.e., tooling costs and</p> <p>9 licensing the heads so we can use them in Pengo</p> <p>10 product"; correct?</p> <p>11 A Correct.</p> <p>12 Q So was that -- do you know what Mr. Matthias meant</p> <p>13 by that statement?</p> <p>14 A We had some internal discussions on a Harleman/Pengo</p> <p>15 business venture. And what he's referring to there</p> <p>16 is some of those discussions that he was involved</p> <p>17 with early on where we had some of those discussions</p> <p>18 about how we might be able to do that.</p> <p>19 Q And you would agree with me at this point in time</p> <p>20 that Mr. Harleman and his company were wanting to</p> <p>21 move forward on this project? They were wanting to</p> <p>22 get heads?</p> <p>23 MR. SPERLING: By "this" project?</p> <p>24 Q (By Mr. Harris) The cast head project with Pengo.</p> <p>25 A Yes.</p>	<p style="text-align: right;">39</p> <p>1 project forward; correct?</p> <p>2 A Correct.</p> <p>3 (Exhibit 44 was marked for</p> <p>4 identification.)</p> <p>5 Q (By Mr. Harris) Then I'll show you Exhibit 44, which</p> <p>6 is labeled Pengo 275. It's a response from</p> <p>7 Mr. Matthias to Ms. Pohlman's e-mail. Again, it's</p> <p>8 dated March 31st, 2010. And in the second</p> <p>9 paragraph he states, We do not need orders to</p> <p>10 support this project -- or support the project?</p> <p>11 A Correct.</p> <p>12 (Exhibit 45 was marked for</p> <p>13 identification.)</p> <p>14 Q (By Mr. Harris) And then I'll show you Pengo 321,</p> <p>15 which we've marked as Exhibit 45. That's your</p> <p>16 e-mail summarizing what?</p> <p>17 A Excuse me. A summary of the tooling costs for the</p> <p>18 margin, the cast parts cost for the margin, and the</p> <p>19 cast heads with an average margin.</p> <p>20 Q Okay. So the tooling, 42,000, that's what the "K"</p> <p>21 means; correct?</p> <p>22 A Correct.</p> <p>23 Q 25 percent margin?</p> <p>24 A Correct.</p> <p>25 Q And then the cast heads, 375,000 with an average</p>
<p style="text-align: right;">38</p> <p>1 Q And he -- in March was willing to place an order for</p> <p>2 the heads; true?</p> <p>3 A Yes.</p> <p>4 Q And that wasn't a requirement for the project to</p> <p>5 move forward, that he place those orders, was it, at</p> <p>6 that point in time?</p> <p>7 MR. SPERLING: Can you explain what you mean by</p> <p>8 "the project"?</p> <p>9 Q (By Mr. Harris) The Pengo cast head project.</p> <p>10 A Yes, it was a requirement.</p> <p>11 Q It was?</p> <p>12 A (Witness nodded head.)</p> <p>13 Q Well, but was it -- was it required that he do it at</p> <p>14 that time before Pengo would move forward with the</p> <p>15 project?</p> <p>16 A Correct. We would not move forward without a PO to</p> <p>17 produce heads for -- for Harleman.</p> <p>18 (Exhibit 43 was marked for</p> <p>19 identification.)</p> <p>20 Q (By Mr. Harris) I'll show you Exhibit No. 43, which</p> <p>21 is labeled Pengo 273. E-mail dated March 31, 2010,</p> <p>22 from Mary Pohlman to Eric Matthias, Jame -- or</p> <p>23 Jim Tomlen, copied to you. In that e-mail,</p> <p>24 Ms. Pohlman states that Mr. Harleman's willing to</p> <p>25 put in an initial order to support moving the</p>	<p style="text-align: right;">40</p> <p>1 42 percent?</p> <p>2 A Correct.</p> <p>3 Q And would it be correct that at this point you</p> <p>4 started working on an agreement, some type of</p> <p>5 agreement form for this project with</p> <p>6 Harleman Manufacturing for the cast heads?</p> <p>7 A Correct.</p> <p>8 Q And I think we've previously identified in</p> <p>9 Mr. Harleman's deposition the agreement that was</p> <p>10 actually entered into between the parties. It was</p> <p>11 marked as Harleman Exhibit 3. And that's a copy of</p> <p>12 the agreement that was actually entered into between</p> <p>13 the parties; correct?</p> <p>14 A Yes. That's -- this is the Commitment Form that we</p> <p>15 put together.</p> <p>16 Q And it was signed by you on behalf of Pengo?</p> <p>17 A Yes.</p> <p>18 Q Dated May 4th, 2010?</p> <p>19 A Yes.</p> <p>20 Q Did you draft this agreement?</p> <p>21 A I did not.</p> <p>22 Q Who did?</p> <p>23 A Dawn Jamison.</p> <p>24 Q And what was Ms. Jamison's position with the company</p> <p>25 at that time?</p>

<p style="text-align: right;">41</p> <p>1 A Inside sales manager. Her position's changed. I</p> <p>2 had to think about the time frame.</p> <p>3 Q Sure. I understand. Do you recall had there been</p> <p>4 previous versions of this agreement that you</p> <p>5 drafted?</p> <p>6 A I'm sure there was revisions to the original that</p> <p>7 was put together before we got to this final</p> <p>8 document.</p> <p>9 Q Do you recall whether or not you did that, those</p> <p>10 prior versions?</p> <p>11 A I do not. I would think that that was also done by</p> <p>12 Dawn, but I'm not a hundred percent clear.</p> <p>13 Q And the terms of the document are self-explanatory,</p> <p>14 but we'll summarize. Obviously, Harleman was to pay</p> <p>15 the tooling costs and maintenance costs; correct?</p> <p>16 A Correct.</p> <p>17 Q We talked about the tooling. What were the</p> <p>18 maintenance costs? What -- what did those entail?</p> <p>19 A In essence, it's just over time as the tooling gets</p> <p>20 used, things -- things wear and you start to lose</p> <p>21 tolerances on parts, and so the tooling just needs</p> <p>22 to be maintained in order to maintain overall --</p> <p>23 overall quality.</p> <p>24 Q And then below that is a table that sets forth the</p> <p>25 pricing for each particular item that is being</p>	<p style="text-align: right;">43</p> <p>1 Laurens to its facility?</p> <p>2 A Correct.</p> <p>3 Q And then I'm not going to go through all of the</p> <p>4 elements, but on the next page, it does set forth</p> <p>5 the cast pricing in a table; correct?</p> <p>6 A Correct.</p> <p>7 Q And that pricing was to hold for twelve months from</p> <p>8 the dated and signed agreement; correct?</p> <p>9 A Correct.</p> <p>10 Q So those prices were to run from May 4, 2010,</p> <p>11 through May 4, 2011?</p> <p>12 A Correct.</p> <p>13 Q And then the next paragraph said that Pengo agrees</p> <p>14 to negotiate future prices -- or price increases</p> <p>15 annually based on GPI, I believe, and export</p> <p>16 conversion rates?</p> <p>17 A Correct.</p> <p>18 Q What's GPI?</p> <p>19 A Gross product index.</p> <p>20 Q And is that a figure that's put out by the Commerce</p> <p>21 Department?</p> <p>22 A Correct.</p> <p>23 Q And the export conversion rates would be what?</p> <p>24 A Essentially exchange rates.</p> <p>25 Q So what you were preserving there was the right. In</p>
<p style="text-align: right;">42</p> <p>1 developed; is that true?</p> <p>2 A No. It details out what the tooling costs for those</p> <p>3 items is going to be.</p> <p>4 Q So that's just the tooling cost?</p> <p>5 A Correct. For the heads and the parts.</p> <p>6 Q And then the next paragraph says, "Samples, (3 to 5</p> <p>7 of each to be provided in July of 2010)"?</p> <p>8 A Correct.</p> <p>9 Q We're talking about a sample of each thing that was</p> <p>10 being cast; correct?</p> <p>11 A Correct.</p> <p>12 Q And the contracts to be -- in the next paragraph --</p> <p>13 it states it's to be for the life of the patent; is</p> <p>14 that right?</p> <p>15 A Correct.</p> <p>16 Q And then the fourth paragraph are the terms -- what</p> <p>17 we commonly refer to as "credit terms"; correct?</p> <p>18 A Correct.</p> <p>19 Q And it was 1 percent, 10 net 30. Which means that</p> <p>20 if they paid within 10 days, they got a 1 percent</p> <p>21 discount and the entire invoice would be due 30 days</p> <p>22 after delivery?</p> <p>23 A Correct.</p> <p>24 Q And then it states, "FOB Laurens, Iowa." That means</p> <p>25 that Harleman had to pay from -- for shipping from</p>	<p style="text-align: right;">44</p> <p>1 other words, if the government determined the gross</p> <p>2 price index went up 10 percent, you could use that</p> <p>3 in negotiating your prices up 10 percent?</p> <p>4 A As a rule, yes.</p> <p>5 Q And then, in other words -- and then won't try to</p> <p>6 explain export conversion rates, but it's whatever</p> <p>7 the Chinese currency would be trading versus the</p> <p>8 American dollar?</p> <p>9 A Correct.</p> <p>10 Q Now, were there other terms of the agreement that</p> <p>11 were not contained in Exhibit 3?</p> <p>12 A I guess I need more specific --</p> <p>13 Q Well --</p> <p>14 A For what you're asking.</p> <p>15 Q -- were there other things that Harleman</p> <p>16 Manufacturing and Pengo agreed to that were not set</p> <p>17 forth in that document?</p> <p>18 A No.</p> <p>19 (Exhibit 46 was marked for</p> <p>20 identification.)</p> <p>21 Q (By Mr. Harris) Mr. Scudder, I want to show you what</p> <p>22 we've marked as Exhibit 46, a document labeled Pengo</p> <p>23 347 and 348. That's a memorandum to Dawn Jamison</p> <p>24 from you; correct?</p> <p>25 A Correct.</p>

<p style="text-align: right;">45</p> <p>1 Q About Harleman contract and pricing. And you state, 2 "Please review and draft up to send out?" 3 A Correct. 4 Q And this is something that you put together? 5 A Correct. 6 Q You would agree with me on the second page of this 7 draft document, Paragraph 6 is different from what's 8 contained in the actual Commitment Form that was 9 signed by the parties; isn't it? 10 A Correct. 11 Q And it states, "Pengo will agree to pay X percent 12 for each head purchased"? 13 A Correct. 14 Q So at the time you drafted this document, Pengo was 15 still contemplating purchasing heads from 16 Harleman Manufacturing? 17 A Correct. 18 Q Do you know when this was sent to Ms. Jamison? 19 A I do not. 20 Q Why did that paragraph get taken out? 21 A That was when we ultimately decided that we were 22 going to -- if we had a purchase agreement, we'd 23 have two separate agreements, so we'd have a 24 Commitment Form to purchase products as well as a 25 second agreement to be able to purchase products</p>	<p style="text-align: right;">47</p> <p>1 simpler? 2 MR. SPERLING: Could you read the question 3 back, please. 4 Q (By Mr. Harris) Yes. The reason you gave to 5 Mr. Harleman for doing two separate agreements is 6 that it would be simpler? 7 A I don't recall specifically what I wrote in the 8 e-mail that I sent to him on that subject. 9 Q Do you know whether or not any of the samples had 10 been started at the time the commitment was signed? 11 A I don't know. 12 (Exhibit 47 was marked for 13 identification.) 14 Q (By Mr. Harris) I'll show you, Mr. Scudder, what 15 we've marked as Exhibit 47, which is an e-mail chain 16 labeled Pengo 396. I think it starts at the bottom 17 with an e-mail from Mary Pohlman to you and 18 Ms. Jamison, sending the signed agreement from 19 Harleman; correct? 20 A Correct. 21 Q And she states in that e-mail that he's requesting 22 drawings if Pengo has them available for the heads 23 and an update on the samples. 24 Then above that is an e-mail from Mr. Matthias 25 to you asking if you're comfortable to release the</p>
<p style="text-align: right;">46</p> <p>1 back through Harleman. 2 Q And -- and that's what you told Mr. Harleman, that 3 you thought it would be better if you did two 4 separate agreements? 5 A I stated that it needed to be two separate 6 agreements, yes. 7 Q Whatever happened to the second agreement? 8 A We decided as a company not to -- to go that 9 direction. 10 Q Did you ever advise Mr. Harleman that Pengo had made 11 that decision? 12 A Yes. 13 Q Do you know when you advised him of that? 14 A I don't know specifically when. I do know that it 15 was on a -- on a phone call. 16 Q Don't recall the date? 17 A I do not. 18 Q Did you record the conversation? 19 A No, I did not. 20 Q Do you know whether it was before or after the 21 Commitment Form labeled Exhibit 3 was signed by the 22 parties on May 4th, 2010? 23 A I do not. 24 Q And the reason that you gave to Mr. Harleman for 25 doing two separate agreements was that it would be</p>	<p style="text-align: right;">48</p> <p>1 drawings to Harleman. And stating to Mary that the 2 samples have not been started; correct? 3 A Correct. 4 Q And then Ms. Pohlman responds to Mr. Matthias and 5 states, "He is expecting samples in July as stated 6 on the agreement. Is that even doable"? 7 A Correct. 8 Q And you would agree with me the samples were not 9 delivered by July 2010 as set forth in the 10 agreement; true? 11 A Correct. 12 Q Now, at the time this agreement was entered into 13 here on May 4th, 2010, was there -- did anyone at 14 Pengo think that Harleman Manufacturing had copied a 15 design of Pengo? 16 A No. 17 Q Who is R. Frost? 18 A He was a business development manager for a short 19 time frame. 20 Q What was his full name? 21 A Robert Frost. 22 Q Do you know when he was business development 23 manager? 24 A I don't know the exact time frame. He was there for 25 a little over a year, and he's been gone about two</p>

<p style="text-align: right;">49</p> <p>1 years. So in that 2012/2013 time frame.</p> <p>2 Q Was he there working for Pengo in 2010?</p> <p>3 A I believe he was. Actually, that may be the time</p> <p>4 frame, 2010 to 2012.</p> <p>5 Q What -- what did he do as business development</p> <p>6 manager?</p> <p>7 A He was responsible for product development primarily</p> <p>8 on the foundation tooling side.</p> <p>9 Q What involvement did he have with regard to the</p> <p>10 Harleman cast head project?</p> <p>11 A Actually, very little. I tried to bring him into</p> <p>12 the project. I know that he was on at least one,</p> <p>13 possibly two conference calls with Ron and I and</p> <p>14 others but essentially had very little impact on the</p> <p>15 project.</p> <p>16 (Exhibit 48 was marked for</p> <p>17 identification.)</p> <p>18 Q (By Mr. Harris) I'll show you what we've marked as</p> <p>19 Exhibit 48. A document labeled Pengo 432, which</p> <p>20 appears to be an e-mail from R. Frost to you,</p> <p>21 Dana Scudder, dated May 20th, 2010; correct?</p> <p>22 A Correct.</p> <p>23 Q And in this e-mail, Mr. Frost states, "We know this</p> <p>24 is the guy that copied our spiral (really didn't do</p> <p>25 too well) but none the same, we did have a sell to</p>	<p style="text-align: right;">51</p> <p>1 A Not that I'm aware of.</p> <p>2 Q Now, after the Commitment Form was signed May of</p> <p>3 2010, would you agree with me that there were some</p> <p>4 oral modifications to the agreement?</p> <p>5 A I guess I need a little more specific information.</p> <p>6 Q Well, was there ever a discussion about Pengo</p> <p>7 assuming the tooling or maintenance costs?</p> <p>8 A There were discussions about Pengo paying for the</p> <p>9 tooling cost, but I believe that was prior to the</p> <p>10 agreement being signed, not after.</p> <p>11 Q You don't recall there being any discussions after</p> <p>12 that date?</p> <p>13 A Not that I recall.</p> <p>14 Q Do you know did Jim Tomlen ever tell Mr. Harleman</p> <p>15 that Pengo would agree to assume some of the</p> <p>16 maintenance and tooling costs on the project?</p> <p>17 A Not that I recall.</p> <p>18 Q If he had said that, would he have the authority to</p> <p>19 say that on behalf of Pengo?</p> <p>20 A No, he would not.</p> <p>21 MR. SPERLING: We've been going for about</p> <p>22 another hour. When you're at a convenient place.</p> <p>23 MR. HARRIS: That's fine. Let me take a break</p> <p>24 because I think I can't find something anyway, other</p> <p>25 finding a fax that someone sent to me that somehow</p>
<p style="text-align: right;">50</p> <p>1 him for one of them. Me and Wayne Beach were amazed</p> <p>2 that they even got" -- is it "filing date"?</p> <p>3 A That's correct, yes. Should be filing date.</p> <p>4 Q Did you discuss this e-mail with Mr. Frost and what</p> <p>5 he meant by that?</p> <p>6 A I did.</p> <p>7 Q What did he tell you?</p> <p>8 A Well, first, I explained that the spiral rock auger</p> <p>9 that Harleman has was not copied from the Pengo</p> <p>10 spiral auger, that he was mistaken about that.</p> <p>11 Because our spiral design is different than the</p> <p>12 Harleman design, which is what he's referencing</p> <p>13 there as far as not doing too well. He's a very</p> <p>14 opinionated person. But the filing date just</p> <p>15 referred to the patent that he had on that and that</p> <p>16 was his opinion about what he thought about the</p> <p>17 Harleman patent.</p> <p>18 Q Did anyone else in Pengo share Mr. Frost's belief?</p> <p>19 MR. SPERLING: Object to the extent you're</p> <p>20 asking the witness to testify about what others</p> <p>21 believed.</p> <p>22 Q (By Mr. Harris) Let me rephrase my question: Did</p> <p>23 anyone other than Mr. Frost at Pengo express to you</p> <p>24 an opinion that they thought Harleman Manufacturing</p> <p>25 had copied a design of Pengo?</p>	<p style="text-align: right;">52</p> <p>1 got mixed in my...</p> <p>2 THE VIDEOGRAPHER: Okay. We're off the record.</p> <p>3 (Short break taken.)</p> <p>4 THE VIDEOGRAPHER: Okay. We're back on the</p> <p>5 record.</p> <p>6 Q (By Mr. Harris) All right. Mr. Scudder, I want to</p> <p>7 talk to you a little bit more about the</p> <p>8 conversations that were had with Mr. Harleman</p> <p>9 regarding Pengo purchasing the heads from Harleman.</p> <p>10 Were there, in fact, discussions with Mr. Harleman</p> <p>11 about that before the Commitment Form was signed?</p> <p>12 A Correct.</p> <p>13 Q Can you tell me what those discussions were?</p> <p>14 A They were basically generic discussions on what we</p> <p>15 had as a sales force versus what Harleman had,</p> <p>16 products that he had, products that we had, and how</p> <p>17 we might be able to blend those things together to</p> <p>18 come up with an agreement to help each other's</p> <p>19 companies sell a product.</p> <p>20 Q Did you ever discuss quantities?</p> <p>21 A No. Everything was very high level and what I would</p> <p>22 call brainstorming type ideas.</p> <p>23 Q Did Mr. Harleman ever express to you that that was</p> <p>24 important to him in this transaction?</p> <p>25 MR. SPERLING: And by "this transaction,"</p>

<p style="text-align: right;">53</p> <p>1 you're referring to what?</p> <p>2 Q (By Mr. Harris) The agreement to do the -- to have</p> <p>3 Pengo do the cast heads.</p> <p>4 A Say that one more time, please.</p> <p>5 Q Did Mr. -- in -- in the discussions regarding Pengo</p> <p>6 purchasing or potentially purchasing heads from</p> <p>7 Harleman, did Mr. Harleman ever express to you that</p> <p>8 that was important to him in his decision for his</p> <p>9 company to enter into the agreement with Pengo to</p> <p>10 have Pengo cast the heads?</p> <p>11 A No. That was not part of the agreement on the</p> <p>12 Commitment Form for cast heads.</p> <p>13 Q I know it wasn't that. I know you're -- it's not</p> <p>14 part of that form that was signed, but in the</p> <p>15 discussions, did he ever tell you words to the</p> <p>16 effect, Dana, that's important to me, that's a big</p> <p>17 reason I'm thinking about going with Pengo?</p> <p>18 Anything like that?</p> <p>19 A No.</p> <p>20 Q Now, were these discussions just between you and</p> <p>21 Mr. Harleman, or were there others involved?</p> <p>22 A Sometimes there were others involved. We had</p> <p>23 multiple conference calls through this process, so</p> <p>24 there was other people involved in the</p> <p>25 conversations. And then in some cases, one of my</p>	<p style="text-align: right;">55</p> <p>1 today."</p> <p>2 Q And that was you telling Mr. Harleman that it wasn't</p> <p>3 going to be one consolidated agreement regarding</p> <p>4 Pengo purchasing heads and also casting heads for</p> <p>5 Harleman?</p> <p>6 A Correct.</p> <p>7 Q And that was sent the day before the Commitment Form</p> <p>8 is dated; correct?</p> <p>9 A Correct.</p> <p>10 Q And so you would agree with me, then, as of</p> <p>11 May 3rd, 2010, you were still indicating to</p> <p>12 Mr. Harleman that Pengo was going to buy heads from</p> <p>13 Harleman. It was just going to be under a separate</p> <p>14 agreement?</p> <p>15 MR. SPERLING: I object to the characterization</p> <p>16 of the statements in Exhibit 49.</p> <p>17 Q (By Mr. Harris) You can go ahead and answer the</p> <p>18 question.</p> <p>19 MR. SPERLING: Would you read the question back</p> <p>20 for the witness, please.</p> <p>21 (The requested portion of the record was</p> <p>22 read by the reporter.)</p> <p>23 A I would state that we were still having some generic</p> <p>24 discussions on the possibility of that coming</p> <p>25 together.</p>
<p style="text-align: right;">54</p> <p>1 salespeople was with me when I was at the Harleman</p> <p>2 facility.</p> <p>3 Q Do you recall who the other people at Pengo were</p> <p>4 that were involved in these discussions?</p> <p>5 A Jim Tomlen, Eric Hennarichs, Brian Rickards,</p> <p>6 Dawn Jamison, and Robert Frost.</p> <p>7 Q Anyone else that you can think of?</p> <p>8 A Not that I recall, but anybody in that initial list</p> <p>9 that we went through and put together for Pengo</p> <p>10 employees could have been on any one of those, you</p> <p>11 know, conference calls.</p> <p>12 (Exhibit 49 was marked for</p> <p>13 identification.)</p> <p>14 Q (By Mr. Harris) I'll show you what I've marked as</p> <p>15 Exhibit 49, a document labeled Pengo 389. That's an</p> <p>16 e-mail that you sent to Mr. Harleman on May 3rd,</p> <p>17 2010; correct?</p> <p>18 A Correct.</p> <p>19 Q And if you would, please, read that first sentence</p> <p>20 for us.</p> <p>21 A "To simplify everything, I think we need two</p> <p>22 separate agreements, one for us to supply castings</p> <p>23 and a second for us to purchase other products. I</p> <p>24 am having Dawn redo the agreement and put in the</p> <p>25 changes we discussed. She will have it to you</p>	<p style="text-align: right;">56</p> <p>1 Q (By Mr. Harris) Well, you would agree with me that</p> <p>2 in Exhibit 49, you don't say anything about Pengo's</p> <p>3 not going to buy heads from Harleman Manufacturing?</p> <p>4 A I would agree from the standpoint that what I'm</p> <p>5 indicating in my e-mail is that we have two separate</p> <p>6 agreements that we need to put together for two</p> <p>7 separate projects that don't tie into each other</p> <p>8 from that standpoint.</p> <p>9 Q And you believe that simplifies everything?</p> <p>10 A I believe that two independent agreements would</p> <p>11 simplify everything, yes.</p> <p>12 Q Now, I think before we took our break, I was talking</p> <p>13 to you about after the Commitment Form was signed</p> <p>14 whether Pengo agreed that it would absorb some of</p> <p>15 the tooling and/or maintenance costs. And you said</p> <p>16 that you did not recall that ever being said, and if</p> <p>17 Mr. Tomlen said that, he didn't have authority;</p> <p>18 correct?</p> <p>19 A Correct.</p> <p>20 (Exhibit 50 was marked for</p> <p>21 identification.)</p> <p>22 Q (By Mr. Harris) I'll show you what we've marked as</p> <p>23 Exhibit 50, which is a document labeled Pengo 531.</p> <p>24 An e-mail from James Tomlen to you dated June 9th,</p> <p>25 2010. And he's talking about a conversation he had</p>

<p style="text-align: right;">57</p> <p>1 with Mr. Harleman; correct?</p> <p>2 A Correct.</p> <p>3 Q And in the second sentence he states, "Told him the</p> <p>4 samples are being ordered and no need for a PO";</p> <p>5 correct?</p> <p>6 A Correct.</p> <p>7 Q And then in the next sentence, he states, "I</p> <p>8 apologized for the misunderstandings, and Ron was</p> <p>9 understanding. I feel that he was a bit</p> <p>10 disappointed when he signed the agreement, and then</p> <p>11 we asked for a PO"; correct?</p> <p>12 A Correct.</p> <p>13 Q And then he states that he -- that Ron mentioned a</p> <p>14 conversation with you regarding maintenance costs on</p> <p>15 the tooling, and you advised him that Pengo would</p> <p>16 assume this responsibility?</p> <p>17 A Correct.</p> <p>18 Q Do you recall having such a conversation with</p> <p>19 Mr. Harleman?</p> <p>20 A I do not recall having that conversation.</p> <p>21 Q Did you ever tell Mr. Tomlen that you never made</p> <p>22 such a statement?</p> <p>23 A I do not recall telling Jim that, no.</p> <p>24 Q And you would agree with me that in this e-mail</p> <p>25 Mr. Tomlen's telling you that Ron's asking for a new</p>	<p style="text-align: right;">59</p> <p>1 June 28th, 2010. In the first sentence he states</p> <p>2 he received this notice from GST that the supplier</p> <p>3 (520) for Harleman castings issued a 30 percent</p> <p>4 increase in price for all Harleman items; correct?</p> <p>5 A Correct.</p> <p>6 Q Now, do you know what 520 means or what it's</p> <p>7 referring to?</p> <p>8 A We number our foundries that we use in China, so</p> <p>9 it's referring to a specific foundry. I can't give</p> <p>10 you the correlation today of what 520 equals, but</p> <p>11 it's one of our suppliers.</p> <p>12 Q It's simpler than trying to pronounce Chinese names?</p> <p>13 A Correct.</p> <p>14 Q Okay. And then he goes on to state that GST has</p> <p>15 obtained a new quote from a different supplier (910)</p> <p>16 and has suggested that we move this project to them.</p> <p>17 Again, you don't know which specific foundry 910 is?</p> <p>18 A I do not. But it does reflect one of our suppliers.</p> <p>19 Q And then it states that if we move the project to</p> <p>20 910, the average increase per item is 8.4 percent;</p> <p>21 correct?</p> <p>22 A Correct.</p> <p>23 Q And then he's underlined, "The customer needs to be</p> <p>24 notified of this delay in development"; true?</p> <p>25 A Correct.</p>
<p style="text-align: right;">58</p> <p>1 agreement just to clarify?</p> <p>2 A Correct.</p> <p>3 Q Now, you would agree with me looking at Exhibit 50,</p> <p>4 as of June 9th, 2010, the samples haven't even</p> <p>5 been ordered yet?</p> <p>6 A I'm not clear on the exact date the samples were</p> <p>7 ordered.</p> <p>8 Q And the Commitment Form provided that you were going</p> <p>9 to provide those samples by the end of July;</p> <p>10 correct?</p> <p>11 A Correct.</p> <p>12 Q Do you know did anyone advise Mr. Harleman as of</p> <p>13 June 9th, 2010, that the deliveries of the samples</p> <p>14 may not be done by the end of July?</p> <p>15 A Jim Tomlen was keeping Harleman in the loop as far</p> <p>16 as the delivery schedule on products or samples</p> <p>17 coming in. And I believe there's also some e-mails</p> <p>18 from Mary Pohlman, which also contain some updates</p> <p>19 on the project.</p> <p>20 (Exhibit 51 was marked for</p> <p>21 identification.)</p> <p>22 Q (By Mr. Harris) I'll show you Exhibit 51, which is a</p> <p>23 document labeled Pengo 621, e-mail from Mr. Matthias</p> <p>24 to Mr. Rickards and you, copies to several people</p> <p>25 including Mr. Tomlen. The e-mail is dated</p>	<p style="text-align: right;">60</p> <p>1 Q And he goes on to state that nothing has been done</p> <p>2 on this project overseas; correct?</p> <p>3 A Correct.</p> <p>4 Q And it says that if it's moved to 910 or to a new</p> <p>5 supplier, another 10 to 15 days will go by before</p> <p>6 they actually start making the patterns?</p> <p>7 A Correct.</p> <p>8 Q And then he goes on to state in bold print that "At</p> <p>9 this pace, samples will not start arriving until mid</p> <p>10 to late September"?</p> <p>11 A Correct.</p> <p>12 Q Do you know was Mr. Harleman ever advised of that</p> <p>13 delay?</p> <p>14 A Yes, at some point he was advised.</p> <p>15 Q Do you know who advised him?</p> <p>16 A I don't know specifically, but it's in the e-mail</p> <p>17 trail of information.</p> <p>18 Q So you believe there's an e-mail from someone to</p> <p>19 Harleman stating that there was going to be a delay?</p> <p>20 A Correct.</p> <p>21 Q You would agree with me that that would be a</p> <p>22 variation from the Commitment Form that was signed</p> <p>23 by the parties?</p> <p>24 A On the sample dates?</p> <p>25 Q Yes.</p>

<p style="text-align: right;">61</p> <p>1 A Correct.</p> <p>2 Q Did anyone ever propose entering into a new</p> <p>3 agreement?</p> <p>4 A Not that I'm aware of.</p> <p>5 (Exhibit 52 was marked for</p> <p>6 identification.)</p> <p>7 Q (By Mr. Harris) I'll now show you what we've marked</p> <p>8 as Exhibit 52, a document labeled Pengo 669. E-mail</p> <p>9 from Mary Pohlman to Dawn Jamison and you. And</p> <p>10 Mr. Tomlen, dated July 6th, 2010. And she talks</p> <p>11 about a phone call she had with Mr. Harleman, and</p> <p>12 she states, "He is still anticipating samples end of</p> <p>13 July. I have not told him anything yet because I do</p> <p>14 not know what the exact dates are." That's what it</p> <p>15 says; correct?</p> <p>16 A Correct.</p> <p>17 Q You would agree with me, then, as of July 6th,</p> <p>18 2010, Mr. Harleman had not been informed that there</p> <p>19 was going to be a delay in the samples?</p> <p>20 A Correct.</p> <p>21 Q Now, these samples getting from China, the process</p> <p>22 was the foundry -- the foundry in China would make</p> <p>23 the samples, and then they would ship them to Pengo</p> <p>24 in Iowa; correct?</p> <p>25 A Correct.</p>	<p style="text-align: right;">63</p> <p>1 Q You would agree with me that Pengo would not pay for</p> <p>2 air freight to get those samples over here quicker,</p> <p>3 would they?</p> <p>4 A We approached Harleman about air freighting the</p> <p>5 samples in, and the answer back was no on the air</p> <p>6 freight. We made the decision to bring them in</p> <p>7 ocean freight.</p> <p>8 Q But you agreed with me that the process was to be</p> <p>9 Pengo was supposed to pay from China to Iowa; right?</p> <p>10 A On ocean freight.</p> <p>11 Q Well, there's nothing stated about that in the</p> <p>12 Commitment Form, is there?</p> <p>13 A No, not in the Commitment Form.</p> <p>14 Q And there's nothing in the Commitment Form about</p> <p>15 Harleman paying anything for shipping from China to</p> <p>16 the Pengo facility in Iowa, is there?</p> <p>17 A No.</p> <p>18 Q And would you agree with me by this time,</p> <p>19 Mr. Harleman was becoming a little frustrated?</p> <p>20 (Exhibit 54 was marked for</p> <p>21 identification.)</p> <p>22 A Correct.</p> <p>23 Q (By Mr. Harris) Would you agree that he had reason</p> <p>24 to be frustrated?</p> <p>25 A Correct.</p>
<p style="text-align: right;">62</p> <p>1 Q And that would be at Pengo's expense?</p> <p>2 A Correct.</p> <p>3 Q And then when the -- the items would be shipped from</p> <p>4 the Pengo facility in Iowa to Harleman, it would be</p> <p>5 at Harleman's expense?</p> <p>6 A Correct.</p> <p>7 (Exhibit 53 was marked for</p> <p>8 identification.)</p> <p>9 Q (By Mr. Harris) I'll now show you what's marked as</p> <p>10 Exhibit 53, which is a document labeled Pengo 696.</p> <p>11 And that appears to be an e-mail that Mr. Matthias</p> <p>12 sent to you on July 9th of 2010 with a copy to</p> <p>13 Mr. Tomlen entitled -- or subject line, Harleman</p> <p>14 time line, saying that the first five samples will</p> <p>15 be ready to ship to us in early September. I should</p> <p>16 see them in late September. And then it says, "The</p> <p>17 remaining castings will be shipping to us late</p> <p>18 September with delivery in mid to late October";</p> <p>19 correct?</p> <p>20 A Correct.</p> <p>21 Q And in that e-mail he states in bold, "Note we can</p> <p>22 expedite some of these dates if we bring the samples</p> <p>23 by here. All dates listed above are using ocean</p> <p>24 freight"; correct?</p> <p>25 A Correct.</p>	<p style="text-align: right;">64</p> <p>1 Q And I'll show you Exhibit 54, which is labeled</p> <p>2 Pengo 778. And the bottom's an e-mail from</p> <p>3 Mr. Tomlen, September 16th, 2010. Doesn't say who</p> <p>4 it's to but just says "all." And he's talking about</p> <p>5 a conversation that he and Ms. Pohlman just had with</p> <p>6 Mr. Harleman that was very tense over the delays on</p> <p>7 the cast head project. States that he's close to</p> <p>8 walking away from this project. That's what it</p> <p>9 says?</p> <p>10 A Correct.</p> <p>11 Q And then you responded by saying you were flying and</p> <p>12 that you would call Ron that afternoon?</p> <p>13 A Correct.</p> <p>14 Q Do you recall whether you called Mr. Harleman or</p> <p>15 not?</p> <p>16 A I did, yes.</p> <p>17 Q Do you recall what he said?</p> <p>18 A I do not recall the specifics of that conversation.</p> <p>19 Q Now, at this point, Mr. Harleman's company has</p> <p>20 already paid you \$43,000 for the tooling, hadn't he?</p> <p>21 A I'm not sure.</p> <p>22 Q And it was around this time that the subject came up</p> <p>23 that -- that Mr. Harleman wanted a document saying</p> <p>24 that the tooling belonged to him?</p> <p>25 A Around that time frame, yes.</p>

<p style="text-align: right;">65</p> <p>1 Q And what was Pengo's position on such a request?</p> <p>2 A Request for?</p> <p>3 Q An agreement that the tooling belonged to Harleman.</p> <p>4 A That we would not honor that request.</p> <p>5 Q And why is it that Pengo wouldn't honor that</p> <p>6 request?</p> <p>7 A As a rule, as a company, we do not provide tooling</p> <p>8 back to customers.</p> <p>9 Q Well, but you would agree with me this wasn't a</p> <p>10 standard situation, was it?</p> <p>11 A No.</p> <p>12 Q And this was a patented product of Harleman?</p> <p>13 A Some of the parts were, yes.</p> <p>14 Q And you would agree with me that Pengo couldn't use</p> <p>15 that tooling for any other customer?</p> <p>16 A Absolutely not.</p> <p>17 Q You wouldn't agree with that?</p> <p>18 A No, I mean, we couldn't use --</p> <p>19 Q Oh, right.</p> <p>20 A Sorry.</p> <p>21 Q Okay.</p> <p>22 A Rephrase.</p> <p>23 Q My poor question, probably. I asked it in a leading</p> <p>24 manner, and it's sometimes easier not to.</p> <p>25 So the tooling had no use to Pengo?</p>	<p style="text-align: right;">67</p> <p>1 Mr. Harleman wants an agreement that if Pengo and</p> <p>2 Harleman should part ways that he'll own the</p> <p>3 tooling; correct?</p> <p>4 A Correct.</p> <p>5 Q And at the top is Mr. Rickards' response?</p> <p>6 A Correct.</p> <p>7 Q And he says, among other things, if he, being</p> <p>8 Harleman, pulled the tooling and sent to another</p> <p>9 foundry, we lose all the resources put into this</p> <p>10 project?</p> <p>11 A Correct.</p> <p>12 (Exhibit 56 was marked for</p> <p>13 identification.)</p> <p>14 MR. HARRIS: Actually, you just want to stop</p> <p>15 now for lunch?</p> <p>16 MR. SPERLING: That's fine.</p> <p>17 MR. HARRIS: Why don't we just stop now for</p> <p>18 lunch.</p> <p>19 THE VIDEOGRAPHER: Okay. We're off the record.</p> <p>20 (Short break taken.)</p> <p>21 THE VIDEOGRAPHER: We're back on the record.</p> <p>22 Q (By Mr. Harris) Mr. Scudder, we're back from lunch.</p> <p>23 We'll try to pick up where we left off. And I think</p> <p>24 we'd talked about Exhibit 55 with Mr. Rickards'</p> <p>25 e-mail of September 24th, 2010. I'm going to show</p>
<p style="text-align: right;">66</p> <p>1 A Correct.</p> <p>2 Q But you knew that if you provided an agreement to</p> <p>3 Mr. Harleman that said the tooling belonged to him,</p> <p>4 he would have more leverage, wouldn't he?</p> <p>5 A We didn't view it as leverage.</p> <p>6 Q Well, but you viewed it as he would have the right</p> <p>7 to walk away?</p> <p>8 A Well, per the Commitment Form, we both had the right</p> <p>9 to walk away.</p> <p>10 Q But in practice, if you kept his tooling, he was</p> <p>11 going to be out his \$43,000?</p> <p>12 A Correct. But we also offered to return that money.</p> <p>13 Q Did you do that at the time that he requested an</p> <p>14 agreement saying that the tooling belonged to him?</p> <p>15 A I don't know the specific date, but it would have</p> <p>16 been sometime after that initial request.</p> <p>17 Q And who made that offer to him?</p> <p>18 A I don't know specifically, but I believe it was</p> <p>19 Brian Rickards.</p> <p>20 (Exhibit 55 was marked for</p> <p>21 identification.)</p> <p>22 Q (By Mr. Harris) I'll show you what we've marked as</p> <p>23 Exhibit 55, Pengo 799. Sorry. The bottom e-mail is</p> <p>24 from Mr. Matthias to you dated September 23rd,</p> <p>25 2010, and that's where he informs you that</p>	<p style="text-align: right;">68</p> <p>1 you now what I've marked as Exhibit 56. It's</p> <p>2 labeled Pengo 800. And I think at the top is your</p> <p>3 response to that e-mail; is that correct?</p> <p>4 A Correct.</p> <p>5 Q And you talk in there that you thought the biggest</p> <p>6 issue was Ron had been talking with Eric, Dawn, Jim</p> <p>7 and myself. And you said he seems to be getting</p> <p>8 different information, which I'm on top of. What --</p> <p>9 what did you mean by that?</p> <p>10 A We had had a conversation -- I'm not sure of the</p> <p>11 exact time frame -- prior to that -- "we" being</p> <p>12 myself and Ron -- about the time line, so when I got</p> <p>13 the original e-mail, I was confused as to why he was</p> <p>14 upset because the time line had not changed. And so</p> <p>15 my assumption was the fact that he was getting</p> <p>16 information from more than one person, that it was</p> <p>17 becoming confusing as far as the actual dates that</p> <p>18 were coming out.</p> <p>19 Q Now, when you say you talked to him, was that by</p> <p>20 phone?</p> <p>21 A I don't remember.</p> <p>22 Q Do you -- in your position with Pengo, do you make a</p> <p>23 practice of logging phone calls?</p> <p>24 A No, we do not.</p> <p>25 Q So as far as there being any record of when you</p>

<p style="text-align: right;">69</p> <p>1 would have talked to him, you're not aware of</p> <p>2 anything that would exist?</p> <p>3 A No, I am not.</p> <p>4 Q Do you have a cell phone that you use primarily for</p> <p>5 business?</p> <p>6 A Yes, I do.</p> <p>7 Q Would that be true back in 2010?</p> <p>8 A Yes, it would be.</p> <p>9 Q What was that cell phone number?</p> <p>10 A 561-400-9311.</p> <p>11 Q And is that your primary method of communication for</p> <p>12 your employment?</p> <p>13 A Yes, it is.</p> <p>14 Q I know you're in Florida, and the main office is in</p> <p>15 Iowa. Do you have a separate office, or do you just</p> <p>16 work out of your home?</p> <p>17 A I work from home.</p> <p>18 Q Do you have a land line or do you just use your cell</p> <p>19 phone all the time for work?</p> <p>20 A I do have a land line.</p> <p>21 Q Is it your personal land line or is it dedicated to</p> <p>22 company business?</p> <p>23 A Personal.</p> <p>24 Q All right. Do you make a practice of using it for</p> <p>25 work?</p>	<p style="text-align: right;">71</p> <p>1 but he's talking about he had a very cordial</p> <p>2 conversation that he had with Mr. -- or with Ron</p> <p>3 today. And he states he assured him that we would</p> <p>4 be sending him a document stating that the tooling</p> <p>5 would belong to him after payment in the eventuality</p> <p>6 that Pengo and Harleman Manufacturing should part</p> <p>7 company. Is that what he said?</p> <p>8 A Correct.</p> <p>9 Q And then he goes on to state, "Our decision to air</p> <p>10 freight the samples was very positive." Was there a</p> <p>11 subsequent decision to send the -- the samples by</p> <p>12 air freight?</p> <p>13 A We did have discussions on air freight versus ocean</p> <p>14 freight.</p> <p>15 Q Would you agree with me that this appears to be</p> <p>16 Mr. Tomlen indicating that Pengo would send the</p> <p>17 samples by air freight?</p> <p>18 A Correct. And just for reference, if you'll go back</p> <p>19 to that Exhibit 56 where it says "fax number" under</p> <p>20 my signature line.</p> <p>21 Q Uh-huh.</p> <p>22 A That's my home phone number.</p> <p>23 Q Okay. Very good. I didn't even look there. Thank</p> <p>24 you.</p> <p>25 (Exhibit 57 was marked for</p>
<p style="text-align: right;">70</p> <p>1 A Sometimes.</p> <p>2 Q Okay. And what's that number?</p> <p>3 A Can I look it up?</p> <p>4 Q Sure.</p> <p>5 A That's how often I use it, so -- sorry. Give me</p> <p>6 just a second.</p> <p>7 Q That's fine.</p> <p>8 A I'm going to have to look it up another way. It's</p> <p>9 not in my --</p> <p>10 Q All right. Well, just next time --</p> <p>11 A -- contacts.</p> <p>12 Q Next time we take a break, just do it and you can</p> <p>13 give it to me. It's no problem.</p> <p>14 A Okay.</p> <p>15 Q And then you go on to state to Mr. Rickards that</p> <p>16 you're going to talk to him to discuss what he -- I</p> <p>17 assume you're referring to Mr. Harleman -- is</p> <p>18 looking for in the letter. Do you recall did you</p> <p>19 and Mr. Rickards have that conversation over the</p> <p>20 weekend?</p> <p>21 A I do not recall if it happened over the weekend.</p> <p>22 Q All right. And then down below at the bottom of the</p> <p>23 page, there appears to be -- looks like a response</p> <p>24 from Mr. Tomlen. Or it's kind of difficult to tell</p> <p>25 whether it's in relation to these e-mails or not,</p>	<p style="text-align: right;">72</p> <p>1 identification.)</p> <p>2 Q (By Mr. Harris) And then I'm going to mark as</p> <p>3 Exhibit No. 57 an e-mail from you to Mr. Rickards</p> <p>4 labeled Pengo 836. Oops, I gave you my copy. I</p> <p>5 marked that one. Sorry.</p> <p>6 And these are options that you outline in the</p> <p>7 letter or proposed letter to Mr. Harleman for</p> <p>8 Mr. Rickards to consider; correct?</p> <p>9 A Correct.</p> <p>10 Q There's Option 1. You say that you want to -- well,</p> <p>11 I guess what are you saying there in Option 1? I</p> <p>12 think I understand, but why don't you tell me.</p> <p>13 A Option 1 was to lock in the business for a five-year</p> <p>14 time period.</p> <p>15 Q With him having the right to take the tooling?</p> <p>16 A That did not include the tooling.</p> <p>17 Q All right. Then what's Option 2?</p> <p>18 A Option 2 tied into the quality and delivery on the</p> <p>19 castings. That was one of the concerns that</p> <p>20 Harleman had verbalized. So that was to tie it in</p> <p>21 to say that if the quality exceeds 10 percent of the</p> <p>22 overall volume business and/or the delivery falls</p> <p>23 below 80 percent on time delivery, then the contract</p> <p>24 could be canceled at that point.</p> <p>25 Q And again, you're looking for a five-year agreement;</p>

<p style="text-align: right;">73</p> <p>1 correct?</p> <p>2 A Correct.</p> <p>3 Q And then Option 3?</p> <p>4 A Option 3 would have been if we decided to let</p> <p>5 Harleman have the tooling money back that we would</p> <p>6 have to go back and adjust the net pricing to</p> <p>7 reflect Pengo's expense on the tooling.</p> <p>8 Q And then your next sentence says, "If I agree to</p> <p>9 Harleman ownership, I do not have any protection</p> <p>10 should the decision be made to move the tooling</p> <p>11 elsewhere." What -- what does that mean?</p> <p>12 A That means that Pengo would have had the expense of</p> <p>13 putting all the tooling together, and then Harleman</p> <p>14 could take that tooling and move it from Location A</p> <p>15 to Location B and start doing their own</p> <p>16 manufacturing of cast products.</p> <p>17 Q Do you know which of those options ultimately was</p> <p>18 submitted to Mr. Harleman? Or were any of them</p> <p>19 submitted to him?</p> <p>20 A I know options were submitted, but I wasn't involved</p> <p>21 in the phone call on what was submitted. So I'm</p> <p>22 not -- I'm not sure to answer the question.</p> <p>23 Q And it's your belief that was communicated to him</p> <p>24 orally over the phone as opposed to e-mail or in</p> <p>25 writing; is that right?</p>	<p style="text-align: right;">75</p> <p>1 Manufacturing, LLC, at an agreed upon destination in</p> <p>2 China, along with all supporting documents from</p> <p>3 Pengo Corporation agreeing to the release of all</p> <p>4 tooling in original contract." Did I read that</p> <p>5 correctly?</p> <p>6 A Yes.</p> <p>7 Q Did anything more become of that discussion?</p> <p>8 A Yes. I'm not sure of the time line, but there was</p> <p>9 certainly discussions at Pengo after the receipt of</p> <p>10 that e-mail.</p> <p>11 Q What were the discussions of Pengo?</p> <p>12 A Discussing different options to resolve the</p> <p>13 situation.</p> <p>14 Q Who did you have those discussions with?</p> <p>15 A Primarily with Brian Rickards.</p> <p>16 Q And do you recall were they phone calls?</p> <p>17 A Primarily.</p> <p>18 Q What would have been the other form of</p> <p>19 communication?</p> <p>20 A If we would have been in the same location at the</p> <p>21 same time or if I would have been at the Iowa plant.</p> <p>22 Q It would have been in person?</p> <p>23 A Correct.</p> <p>24 Q How frequently would you be at the Iowa plant back</p> <p>25 in this 2010 time frame?</p>
<p style="text-align: right;">74</p> <p>1 A I'm not sure how it was communicated.</p> <p>2 (Exhibit 58 was marked for</p> <p>3 identification.)</p> <p>4 Q (By Mr. Harris) I'll show you Exhibit 58, which is</p> <p>5 an e-mail from you September 28th, 2010, to</p> <p>6 Mr. Harleman regarding tooling. Is that the</p> <p>7 communication in which the option was submitted to</p> <p>8 him?</p> <p>9 A Yes, it is.</p> <p>10 Q And that was the five-year agreement with the</p> <p>11 cancellation only if quality issues exceed</p> <p>12 10 percent or overall dollar business or on time</p> <p>13 delivery falls below 80 percent; correct?</p> <p>14 A Correct.</p> <p>15 (Exhibit 59 was marked for</p> <p>16 identification.)</p> <p>17 Q (By Mr. Harris) Sorry, there's only one..</p> <p>18 Then Exhibit 59 would be Mr. Harleman's</p> <p>19 response on Tuesday, the 28th. And he states, "We</p> <p>20 already have an agreement in place that says either</p> <p>21 party can cancel with 180 days written notice. The</p> <p>22 agreement I am seeking is an agreement that says</p> <p>23 Harleman Manufacturing, LLC, owns the tooling and</p> <p>24 after the 180 written notice of ending the contract,</p> <p>25 the tooling will be turned over to Harleman</p>	<p style="text-align: right;">76</p> <p>1 A Typically I try for once a quarter on no set</p> <p>2 schedule.</p> <p>3 Q Do you recall did you and Mr. Rickards reach any</p> <p>4 type of consensus as to how you thought you should</p> <p>5 proceed?</p> <p>6 A At this point, we had not made a final decision on</p> <p>7 what our process was going to be.</p> <p>8 Q Did you ever make a decision on what your -- a final</p> <p>9 decision?</p> <p>10 A Ultimately, that was made once we were contacted by</p> <p>11 Harleman's counsel.</p> <p>12 Q And that's when Mr. Harleman's attorney was trying</p> <p>13 to negotiate a settlement with Pengo?</p> <p>14 A Correct.</p> <p>15 Q Now, as part of the process of developing the cast</p> <p>16 heads for Harleman Manufacturing, did you have</p> <p>17 discussions with Mr. Harleman about the number of</p> <p>18 heads he thought he would use in a given year?</p> <p>19 A Yes. When we put the Commitment Form together, we</p> <p>20 asked for him to supply us EAU numbers, which is</p> <p>21 estimated annual usage numbers, which were supplied</p> <p>22 by Harleman.</p> <p>23 Q And as part of that, did you inquire as to the</p> <p>24 number that he had used in the year before?</p> <p>25 A I don't believe so. I believe I just asked for</p>

<p style="text-align: right;">77</p> <p>1 estimated annual usage numbers.</p> <p>2 Q Did Mr. Harleman -- when he supplied you those</p> <p>3 estimated annual usage numbers -- tell you that he</p> <p>4 was factoring in what he anticipated that Pengo</p> <p>5 would purchase from him?</p> <p>6 A No.</p> <p>7 (Exhibit 60 was marked for</p> <p>8 identification.)</p> <p>9 MR. SPERLING: Do you think we could turn the</p> <p>10 air back on.</p> <p>11 MR. HARRIS: Oh, yeah. Turn that down.</p> <p>12 MR. SPERLING: What do I do?</p> <p>13 MR. HARRIS: Just turn it down a little bit to</p> <p>14 like 72.</p> <p>15 Q (By Mr. Harris) Then I'll show you Exhibit 60, which</p> <p>16 is Pengo 897. And these are kind of the</p> <p>17 calculations based on Harleman's estimated annual</p> <p>18 usage, what Pengo would make and what its profit</p> <p>19 margin would be; is that correct?</p> <p>20 A That's correct.</p> <p>21 Q And as I understand that, if Mr. Harleman's company</p> <p>22 had bought all of the estimated annual usage set</p> <p>23 forth in the Commitment Form, Pengo would have total</p> <p>24 sales on the deal in one year of \$425,000,</p> <p>25 47 percent average profit margin, and a profit of</p>	<p style="text-align: right;">79</p> <p>1 of Harleman Manufacturing?</p> <p>2 A That is correct.</p> <p>3 (Exhibit 62 was marked for</p> <p>4 identification.)</p> <p>5 Q (By Mr. Harris) And then Exhibit 62, there's an</p> <p>6 e-mail from Mr. Matthias in the middle of the page</p> <p>7 dated Friday, November 19th, 2010, stating that</p> <p>8 none of the Harleman samples are here. The first</p> <p>9 set of samples are due any day; correct?</p> <p>10 A Correct.</p> <p>11 Q And below that is an e-mail that Ms. Jamison had</p> <p>12 sent a few minutes earlier stating that Harleman has</p> <p>13 300 augers to build for Pike; correct?</p> <p>14 A Correct.</p> <p>15 Q And it states that Mr. Harleman's -- or he can't</p> <p>16 build or won't build until he gets the heads.</p> <p>17 A Correct.</p> <p>18 Q Now, with regard to these samples, what was your</p> <p>19 understanding of the purpose of the samples?</p> <p>20 A The purpose of the samples is for the customer, in</p> <p>21 this case Harleman, to review, inspect and make sure</p> <p>22 that they are built to his specifications and</p> <p>23 requirements.</p> <p>24 Q And you wanted Harleman Manufacturing to test those</p> <p>25 samples; correct?</p>
<p style="text-align: right;">78</p> <p>1 \$199,000; is that right?</p> <p>2 A I'm not a hundred percent sure what I based the</p> <p>3 numbers and the e-mail on. I'd have to double-check</p> <p>4 to verify what I used to develop that math for that</p> <p>5 statement.</p> <p>6 (Exhibit 61 was marked for</p> <p>7 identification.)</p> <p>8 Q (By Mr. Harris) Then I'll show you Exhibit 61, which</p> <p>9 appears to be an e-mail from you dated</p> <p>10 November 11th, 2010, to Mr. Harleman; correct?</p> <p>11 A Correct.</p> <p>12 Q This is an updated schedule of when the samples are</p> <p>13 going to arrive; is that correct?</p> <p>14 A That's correct.</p> <p>15 Q Do you know -- it looks like looking at Exhibit 61,</p> <p>16 as of November 11th -- well, can you say looking</p> <p>17 at that, had anything actually arrived at the Pengo</p> <p>18 facility in Iowa?</p> <p>19 A Not to my knowledge.</p> <p>20 Q And I think what you're saying is you're waiting for</p> <p>21 an update on the 11/9 parts to see where they're at?</p> <p>22 A Yes, those were in transit at the time of this</p> <p>23 e-mail.</p> <p>24 Q So at the time this e-mail is sent, it's your</p> <p>25 understanding there's still no samples in the hands</p>	<p style="text-align: right;">80</p> <p>1 A No. I wanted Harleman to inspect and verify that</p> <p>2 the samples met their criteria for what they were</p> <p>3 looking for.</p> <p>4 Q Do you know did Mr. Matthias recommend that</p> <p>5 Harleman Manufacturing field test the sample heads?</p> <p>6 A I don't recall that, but I wouldn't be surprised by</p> <p>7 that.</p> <p>8 Q And Mr. Harleman was told that if they didn't test</p> <p>9 the samples and they proceeded, it would be at their</p> <p>10 peril; true?</p> <p>11 A I don't recall that. But ultimately what we were</p> <p>12 asking for was a sign-off saying that the samples</p> <p>13 were inspected and/or tested but approved.</p> <p>14 Q Now, do you know when Mr. Harleman's company</p> <p>15 actually received the samples?</p> <p>16 A I do -- do not recall the specific date.</p> <p>17 Q We know it was sometime after November 19th,</p> <p>18 though; correct?</p> <p>19 A That is correct.</p> <p>20 Q And do you recall Mr. Harleman or someone from his</p> <p>21 company alerting you to problems with the multiplane</p> <p>22 heads?</p> <p>23 A Yes. I believe it was an e-mail string where the</p> <p>24 notification came through that there were some</p> <p>25 changes requested.</p>

<p style="text-align: right;">81</p> <p>1 Q Because they weren't fitting properly?</p> <p>2 A Yeah. Correct. It was an ID clearance issue.</p> <p>3 Q How long, in your opinion, do you think is a</p> <p>4 reasonable time for Harleman to inspect those sample</p> <p>5 heads?</p> <p>6 A I would say a week to ten days would be a reasonable</p> <p>7 time.</p> <p>8 Q Now, as part of that process to inspect the -- the</p> <p>9 heads, did Mr. Harleman or someone from his company</p> <p>10 request copies of the 3D part files?</p> <p>11 MR. SPERLING: Could you read the question</p> <p>12 back, please.</p> <p>13 (The requested portion of the record was</p> <p>14 read by the reporter.)</p> <p>15 A It's not part of the standard process, but a request</p> <p>16 was made for 3D drawings.</p> <p>17 Q (By Mr. Harris) And that request was refused by</p> <p>18 Pengo; correct?</p> <p>19 A Correct.</p> <p>20 Q Why was that request refused?</p> <p>21 A Typically it's company policy that we don't release</p> <p>22 3D drawings to any customers.</p> <p>23 Q And why is that the company policy?</p> <p>24 A Because that's what we use to manufacture the</p> <p>25 products.</p>	<p style="text-align: right;">83</p> <p>1 MR. SPERLING: -- in discovery.</p> <p>2 MR. HARRIS: I just -- I know. I've got them.</p> <p>3 Q (By Mr. Harris) You said the 3D are used for</p> <p>4 manufacturing; correct?</p> <p>5 A Correct.</p> <p>6 Q Would you agree that an adequate inspection of the</p> <p>7 samples would also require a comparison of the</p> <p>8 actual samples to the 3D drawings?</p> <p>9 A No. We always provide a 2D drawing for sign-off and</p> <p>10 approvals on sample parts.</p> <p>11 Q But the 3D drawings are what are used to actually</p> <p>12 manufacture them?</p> <p>13 A That's correct.</p> <p>14 Q And if the 3D drawings aren't right, the</p> <p>15 manufacturing process won't be right?</p> <p>16 A That's correct.</p> <p>17 Q But with that said, you don't think that Harleman</p> <p>18 had a right to check those 3D drawings to make sure</p> <p>19 that they were consistent with the samples?</p> <p>20 A That is correct.</p> <p>21 Q And you would agree with me that anyone who had</p> <p>22 those 3D drawings in their possession, if they had</p> <p>23 the manufacturing capability, would be able to</p> <p>24 manufacture the Harleman heads?</p> <p>25 A That's correct.</p>
<p style="text-align: right;">82</p> <p>1 Q And why did you choose to follow that policy in this</p> <p>2 case?</p> <p>3 A Because we didn't want to give the ability -- turn</p> <p>4 over the ability for Harleman to use our drawings to</p> <p>5 go elsewhere to make the like same products.</p> <p>6 Q And do you -- did Pengo think that it had the right</p> <p>7 to retain the 3D drawings?</p> <p>8 A Yes, Pengo spent the time and money to develop the</p> <p>9 information to develop the drawings themselves.</p> <p>10 Q For which Mr. Harleman paid you?</p> <p>11 A No.</p> <p>12 Q That wasn't part of the \$43,000?</p> <p>13 A No, it was not.</p> <p>14 Q You would agree with me there's nothing in the</p> <p>15 Commitment Form about the 3D drawings?</p> <p>16 A Correct.</p> <p>17 Q Did Pengo submit a copyright for those 3D drawings?</p> <p>18 A Not that I'm aware of.</p> <p>19 Q Do you know does Pengo still have possession of</p> <p>20 those 3D drawings?</p> <p>21 A Yes, we do.</p> <p>22 Q Is it Pengo's position --</p> <p>23 MR. SPERLING: Counsel, just -- just so you're</p> <p>24 aware, they were produced --</p> <p>25 MR. HARRIS: Oh, I know.</p>	<p style="text-align: right;">84</p> <p>1 (Exhibit 63 was marked for</p> <p>2 identification.)</p> <p>3 Q (By Mr. Harris) I'll show you what I've marked as</p> <p>4 Exhibit 63. It's labeled Pengo pages 1047 and 1048.</p> <p>5 That's a purchase order from Harleman Manufacturing</p> <p>6 to Pengo for a purchase of 400 single cut heads;</p> <p>7 correct?</p> <p>8 A Correct.</p> <p>9 Q And that's dated December 20th, 2010?</p> <p>10 A Correct.</p> <p>11 Q So you would agree that within less than a month of</p> <p>12 having the sample heads, Harleman had already</p> <p>13 submitted a purchase order for 400 of the single cut</p> <p>14 heads?</p> <p>15 A That's correct.</p> <p>16 Q And this -- this order was fulfilled by Pengo?</p> <p>17 A I know the order was entered on -- I'm not fully</p> <p>18 aware if it was fully fulfilled. I'm not sure when</p> <p>19 the termination portion came into this, but...</p> <p>20 Q Okay.</p> <p>21 A So, unclear.</p> <p>22 Q All right.</p> <p>23 A Unable to answer that question.</p> <p>24 Q Do you have any idea how much time Pengo had in the</p> <p>25 3D drawings?</p>

<p style="text-align: right;">85</p> <p>1 A I believe we estimated around 100 hours.</p> <p>2 Q Was that both the reverse engineering and the 3D</p> <p>3 drawings or was that just the 3D drawings?</p> <p>4 A That would have been both projects.</p> <p>5 Q And as I understand it -- well, help me out here. I</p> <p>6 think I understand, but I want to make sure I do.</p> <p>7 Pengo gets heads from Harleman and the engineer</p> <p>8 people reverse engineer it, which means basically</p> <p>9 coming up with all the specs and everything; is that</p> <p>10 right? Is your understanding?</p> <p>11 A Yes.</p> <p>12 Q And then they also develop the 3D drawings?</p> <p>13 A Yes.</p> <p>14 Q And those 3D drawings were used to create the</p> <p>15 tooling, what would be the patterns, in other words?</p> <p>16 A Yes.</p> <p>17 Q And then the 3D drawings were shipped to China to</p> <p>18 the foundry so that the foundry could create the</p> <p>19 toolings?</p> <p>20 A Yeah. I'm not sure of the method, but they did go</p> <p>21 to 520 and 910.</p> <p>22 Q Both of those entities would have gotten copies of</p> <p>23 the 3D drawings?</p> <p>24 A Initially 520 and eventually 910.</p> <p>25 Q Now, those foundries -- and I know we talked about</p>	<p style="text-align: right;">87</p> <p>1 (Exhibit 64 was marked for</p> <p>2 identification.)</p> <p>3 Q (By Mr. Harris) I'm going to show you Exhibit 64.</p> <p>4 That's an e-mail from Ms. Jamison to you advising</p> <p>5 you of the increased costs from the foundry. And I</p> <p>6 think the second page is the spreadsheet containing</p> <p>7 those?</p> <p>8 A Correct.</p> <p>9 Q And even though Pengo was committed to a price to</p> <p>10 Mr. Harleman's company through May of 2011, the</p> <p>11 foundry was increasing the price on Pengo?</p> <p>12 A Correct.</p> <p>13 Q And as I take it from the column that is set forth</p> <p>14 on the second page of Exhibit 64, that was going to</p> <p>15 result in Pengo's profit margin being lowered to</p> <p>16 some degree?</p> <p>17 A That's correct. Lower for all cast products.</p> <p>18 Q Was there a discussion among the people at Pengo</p> <p>19 about passing those prices -- increases on to</p> <p>20 Mr. Harleman?</p> <p>21 A Yes, there was.</p> <p>22 Q And did Pengo, in fact, increase the prices to</p> <p>23 Mr. Harleman before May the 4th of 2011?</p> <p>24 A I know we went back and looked at it from an overall</p> <p>25 standpoint because when we had the change from 520</p>
<p style="text-align: right;">86</p> <p>1 using the number instead of the name, but are those</p> <p>2 separate companies, separate and apart from Pengo,</p> <p>3 or did Pengo or its parent have an ownership</p> <p>4 interest in those foundries?</p> <p>5 A No ownership. Purely supplier/vendor relationship.</p> <p>6 Q Purely contractual relationship?</p> <p>7 A Correct.</p> <p>8 Q Do you know is there a written contract between the</p> <p>9 two foundries or each of the two foundries and</p> <p>10 Pengo?</p> <p>11 A I don't know if we have contracts. I do know we</p> <p>12 have nondisclosure agreements with all of our China</p> <p>13 suppliers.</p> <p>14 Q And whose job is it to get those agreements? Is</p> <p>15 that something Mr. Rickards does or Mr. Matthias?</p> <p>16 Who handles that for Pengo?</p> <p>17 A That's also through our GST, global sourcing team.</p> <p>18 I don't know whose signature is on those. My</p> <p>19 assumption would be Phillip that runs that</p> <p>20 operation. I can't remember his last name, but it's</p> <p>21 in here somewhere.</p> <p>22 Q Now, shortly after the first of the year in 2011,</p> <p>23 Pengo received price increases from a foundry; is</p> <p>24 that correct?</p> <p>25 A That's correct.</p>	<p style="text-align: right;">88</p> <p>1 to 910, we had increases on the tooling cost.</p> <p>2 And we also had some increases on the cast</p> <p>3 component cost. And at that time, we chose not to</p> <p>4 change the pricing for Harleman and to take that</p> <p>5 pricing on.</p> <p>6 So we went back and reviewed that with these</p> <p>7 increases to see where we were at. And I believe</p> <p>8 it's around the same time frame, there were some</p> <p>9 other requests to make some additional changes from</p> <p>10 Harleman on the tooling. And at that point is when</p> <p>11 we talked about a price variation based on the</p> <p>12 Commitment Form or a price variation from the</p> <p>13 Commitment Form.</p> <p>14 Q And did you -- and I say "you," I mean Pengo. Did</p> <p>15 Pengo ultimately decide to pass some price increases</p> <p>16 on to Harleman Manufacturing?</p> <p>17 A We did.</p> <p>18 Q Even though you had committed to him in the</p> <p>19 Commitment Form that the prices would not increase</p> <p>20 until May 4th of 2011?</p> <p>21 A Yes. Based on some of the changes that Harleman had</p> <p>22 requested that were not part of the original design.</p> <p>23 Q Well, what portion of the costs were the result of</p> <p>24 Harleman asking for changes in the design?</p> <p>25 A I really don't have any way to factor in a</p>

<p style="text-align: right;">89</p> <p>1 percentage to determine what that is.</p> <p>2 Q But you would agree that you passed the entire price</p> <p>3 increase on to Harleman, not just the increase</p> <p>4 associated with changes that he wanted to be made.</p> <p>5 A I would actually have to verify if everything was</p> <p>6 passed on a hundred percent on the price increase</p> <p>7 that we received.</p> <p>8 Q Was there a discussion at some point during this</p> <p>9 time right around the 1st of February about</p> <p>10 Harleman taking the drawings and developing parts</p> <p>11 with another source?</p> <p>12 A Yes. I believe it was in early January when I found</p> <p>13 out that Harleman was working with a company in</p> <p>14 Ningbo for the very same products.</p> <p>15 Q Did you verify that to be the case?</p> <p>16 A I wrote a letter that was e-mailed to Ron Harleman</p> <p>17 where I stated that he was dealing with another</p> <p>18 company in Ningbo. And it was not refuted from that</p> <p>19 standpoint, so that would be my verification.</p> <p>20 Q You wrote a letter to Harleman?</p> <p>21 A Yes.</p> <p>22 Q But you knew he had another source for casting heads</p> <p>23 as early as January of 2010, didn't you?</p> <p>24 A I knew he was bringing in other cast products from</p> <p>25 Ningbo for some of his other products that they</p>	<p style="text-align: right;">91</p> <p>1 refund my 42K in tooling, that would be great." Is</p> <p>2 that the e-mail that you think brought that to your</p> <p>3 attention?</p> <p>4 A Correct.</p> <p>5 Q And on the first page of that document, there's an</p> <p>6 e-mail from Eric Hennarichs to Mr. Tomlen, and it</p> <p>7 says, "Holy shit. Looks like they will blame Ron."</p> <p>8 Do you know what Mr. Hennarichs meant by that?</p> <p>9 A I do not. That's an e-mail from him directly to</p> <p>10 Jim.</p> <p>11 Q Was there any discussion about blaming Mr. Harleman</p> <p>12 for anything?</p> <p>13 A I'm not sure what he's trying to reflect in that</p> <p>14 statement.</p> <p>15 Q Well, do you recall, though, at that time there</p> <p>16 being any discussion about blaming Mr. Harleman for</p> <p>17 something?</p> <p>18 A I do not, no.</p> <p>19 Q You would agree with me that Mr. Harleman still</p> <p>20 didn't have all of his samples as of February the</p> <p>21 11th of 2011?</p> <p>22 A That's correct. We were making new samples based on</p> <p>23 the changes that were requested.</p> <p>24 Q And the new samples that were being made were for</p> <p>25 the multiplane heads that were not correct?</p>
<p style="text-align: right;">90</p> <p>1 manufacture. But I believe in 2011 is when I</p> <p>2 verified that he was doing the cast head project.</p> <p>3 Q And you said "verified" being simply sending a</p> <p>4 letter to Mr. Harleman and not getting any response?</p> <p>5 A And that based on what I was being told.</p> <p>6 Q And who was telling you that?</p> <p>7 A I believe it was Mary Pohlman -- but I can't be a</p> <p>8 hundred percent -- that called me up one day and</p> <p>9 said they had spoken to Ron and he made a comment</p> <p>10 about cast heads and Ningbo, China.</p> <p>11 (Exhibit 65 was marked for</p> <p>12 identification.)</p> <p>13 Q (By Mr. Harris) I'm going to show you what I've</p> <p>14 marked as Exhibit 65. It's a four-page e-mail chain</p> <p>15 labeled Pengo 1163 through 1166. It's kind of hard</p> <p>16 to follow, but I think if you start on the second</p> <p>17 page of that document, Pengo 1164, it begins on the</p> <p>18 bottom of 1165.</p> <p>19 It's an e-mail from Mr. Tomlen (sic) saying,</p> <p>20 "Well, we must all be on the same wave length. Ron</p> <p>21 just called me. 1, he thought he received samples</p> <p>22 from us last week, but he just checked and those are</p> <p>23 from his secondary supplier. 2, they was all good,</p> <p>24 and he received them from China in 3 months. 3, he</p> <p>25 is not happy with us. 4, he said if you could just</p>	<p style="text-align: right;">92</p> <p>1 A I don't remember specifically if it was on the</p> <p>2 multiplane or the other heads as well that -- I know</p> <p>3 on all of the heads there was a request to put part</p> <p>4 numbers and logos and I believe a patent number, but</p> <p>5 then there was an issue with the ID on the -- the</p> <p>6 other headset that also had to be corrected.</p> <p>7 Q And you would agree that Mr. Harleman was within his</p> <p>8 rights to request new samples on the multiplane</p> <p>9 heads to make sure that they would get them correct?</p> <p>10 A Correct.</p> <p>11 Q And that he shouldn't order those for production</p> <p>12 until the samples were correct?</p> <p>13 A Correct.</p> <p>14 MR. SPERLING: We've been going about an hour.</p> <p>15 MR. HARRIS: Yeah.</p> <p>16 MR. SPERLING: When you reach a convenient</p> <p>17 point.</p> <p>18 MR. HARRIS: That's fine. Yeah, that's fine.</p> <p>19 THE VIDEOGRAPHER: Okay. Going off the record.</p> <p>20 (Short break taken.)</p> <p>21 THE VIDEOGRAPHER: We're back on the record.</p> <p>22 Q (By Mr. Harris) Mr. Scudder, at some point after</p> <p>23 Harleman was advised of the price increases, did you</p> <p>24 become aware that Harleman Manufacturing was playing</p> <p>25 a video at a trade show?</p>

<p style="text-align: right;">93</p> <p>1 A I'm not sure on the time frame, but I was made aware</p> <p>2 of a video that was being played at a trade show.</p> <p>3 (Exhibit 66 was marked for</p> <p>4 identification.)</p> <p>5 Q (By Mr. Harris) And we'll mark as Exhibit 66 an</p> <p>6 e-mail labeled Pengo 1259, which appears to be --</p> <p>7 I'll give it to you there -- an e-mail from</p> <p>8 Mr. Tomlen to Mr. Rickards and you and Ms. Jamison,</p> <p>9 dated February 27th, advising that he was at a</p> <p>10 farm show in Kansas City, and Harleman has a booth</p> <p>11 displaying his augers and ag products. And it says</p> <p>12 he's got two TVs playing simultaneously. One shows</p> <p>13 his auger in action, and the other shows the Pengo</p> <p>14 auger at the dig-off; correct?</p> <p>15 A Correct.</p> <p>16 Q What's he mean by "the dig-off"?</p> <p>17 A He's referring to the Pengo cast heads that we sent</p> <p>18 to Harleman Manufacturing.</p> <p>19 Q And the events that took place at Mr. Harleman's</p> <p>20 ranch?</p> <p>21 A Correct.</p> <p>22 Q Did you ask him why he referred to it as "the</p> <p>23 dig-off"?</p> <p>24 A I did not.</p> <p>25 Q Mr. Tomlen was there, wasn't he?</p>	<p style="text-align: right;">95</p> <p>1 A Every cast head auger he would have sold we would</p> <p>2 have made money on.</p> <p>3 Q Right. Did you discuss it with Mr. Rickards?</p> <p>4 A Meaning the video?</p> <p>5 Q Yes.</p> <p>6 A I did have a discussion with Mr. Rickards about the</p> <p>7 video.</p> <p>8 Q Did Mr. Rickards tell you what he thought of the</p> <p>9 video?</p> <p>10 A Mr. Rickards at that point in time had not seen the</p> <p>11 video.</p> <p>12 Q Did he subsequently view it?</p> <p>13 A I'm not sure.</p> <p>14 Q Did he ever tell you what he thought of it?</p> <p>15 A Actually, I'll take that back because we did have a</p> <p>16 comment. He did see the video. I'm not sure when</p> <p>17 and where, but he did see the video. We did have a</p> <p>18 discussion afterwards. He was also disappointed</p> <p>19 that Pengo personnel were in this particular</p> <p>20 marketing video.</p> <p>21 Q Did he have any other comment?</p> <p>22 A We were -- he was going to get with our legal</p> <p>23 counsel to see what options that we might have from</p> <p>24 a legal standpoint to get that removed, and then I</p> <p>25 also called Ron that day and asked him not to play</p>
<p style="text-align: right;">94</p> <p>1 A Jim was there.</p> <p>2 Q And, in fact, in his next or couple sentences down</p> <p>3 he says, "We were all caught on tape"?</p> <p>4 A Correct.</p> <p>5 Q What did you think of the video when you learned of</p> <p>6 it?</p> <p>7 A I was disappointed that anyone would display a video</p> <p>8 that puts human people in it. If a competitor wants</p> <p>9 to take our product and do whatever they want to do,</p> <p>10 that's one thing, but then to have actual personnel</p> <p>11 from the company in it, I thought was very</p> <p>12 distasteful.</p> <p>13 Q But as far as the video itself, you didn't have any</p> <p>14 problem with it?</p> <p>15 A I had a problem that Pengo personnel were in it.</p> <p>16 Q But other than Pengo personnel in it, you didn't</p> <p>17 have any problem with what Harleman was doing with</p> <p>18 it?</p> <p>19 A No.</p> <p>20 Q And I would be correct, you as the sales manager for</p> <p>21 Pengo, it didn't bother you if Harleman was selling</p> <p>22 auger heads, did it?</p> <p>23 A No, it did not.</p> <p>24 Q Because every auger head that he sold that he got</p> <p>25 from Pengo, you made money on?</p>	<p style="text-align: right;">96</p> <p>1 that video.</p> <p>2 Q Did he honor your request?</p> <p>3 A To my knowledge, he did at that time.</p> <p>4 Q Did you know -- did that video, when you reviewed</p> <p>5 it, did it show Eric Hennarichs from Pengo?</p> <p>6 A I don't recall. I don't know.</p> <p>7 Q All right.</p> <p>8 (Exhibit 67 was marked for</p> <p>9 identification.)</p> <p>10 MR. SPERLING: Let me just take a moment before</p> <p>11 you go on to the next one.</p> <p>12 MR. HARRIS: Oh, sure.</p> <p>13 THE VIDEOGRAPHER: We're off.</p> <p>14 (Short break taken.)</p> <p>15 THE VIDEOGRAPHER: We are back on the record.</p> <p>16 Q (By Mr. Harris) Mr. Scudder, I'm going to show you</p> <p>17 what we've marked as Exhibit 67 now, which is a</p> <p>18 letter, I believe, that you authored and sent to</p> <p>19 Mr. Harleman on March 3rd, 2011, a few days after</p> <p>20 you learned of the video; is that correct?</p> <p>21 A That's correct.</p> <p>22 Q And it's dated -- actually, the letter is dated</p> <p>23 March the 1st of 2011; correct?</p> <p>24 A Correct.</p> <p>25 Q What was the purpose of this letter?</p>

<p style="text-align: right;">97</p> <p>1 A The purpose was to outline the events that had taken</p> <p>2 place and summarizing essentially basically where we</p> <p>3 were at at that point in March with the relationship</p> <p>4 between our two companies.</p> <p>5 Q And in the second paragraph you make a reference to</p> <p>6 "during a conference call back in August of 2010."</p> <p>7 Do you recall when that conference call was?</p> <p>8 A I do not.</p> <p>9 Q What did you refer to to establish that a conference</p> <p>10 call occurred in August of 2010?</p> <p>11 A I believe I went and looked at my Outlook calendar.</p> <p>12 Q And it indicated a conference call with</p> <p>13 Mr. Harleman?</p> <p>14 A Correct.</p> <p>15 Q Is there any reason you didn't put the specific date</p> <p>16 of the conference call?</p> <p>17 A No specific reason.</p> <p>18 Q You go on to state, "During a conference call back</p> <p>19 in August of 2010, and as per the MOU, we clearly</p> <p>20 outline that the 3D drawings and the tooling for</p> <p>21 each item would remain Pengo property." What is</p> <p>22 MOU?</p> <p>23 A MOU is a memo of understanding.</p> <p>24 Q What document are you referring to there?</p> <p>25 A That's actually a mistake on my part. I was</p>	<p style="text-align: right;">99</p> <p>1 MR. SPERLING: Can you read the question back,</p> <p>2 please.</p> <p>3 (The requested portion of the record was</p> <p>4 read by the reporter.)</p> <p>5 MR. SPERLING: Objection. Mischaracterizes the</p> <p>6 statement in the letter.</p> <p>7 A In my letter, I'm saying that we're given the right</p> <p>8 to manufacture them, but I'm saying manufacture them</p> <p>9 exclusively for Harleman, not manufacture -- not</p> <p>10 having exclusive manufacturing rights.</p> <p>11 Q (By Mr. Harris) Did -- okay. So what you're saying</p> <p>12 is we could make them only for Harleman?</p> <p>13 A Correct.</p> <p>14 Q Did Pengo ever take the position that it had a right</p> <p>15 to be the exclusive manufacturer of the cast heads</p> <p>16 for Harleman?</p> <p>17 MR. SPERLING: By "the cast heads," do you mean</p> <p>18 any cast heads or these specific cast heads?</p> <p>19 Q (By Mr. Harris) These cast heads that are the</p> <p>20 subject of the Commitment Form.</p> <p>21 A Can you say that one more time, please.</p> <p>22 Q Sure. Did Pengo ever take the position that it had</p> <p>23 the exclusive right to manufacture the cast heads</p> <p>24 set forth in the Commitment Form?</p> <p>25 A Are you asking if that's what our company position</p>
<p style="text-align: right;">98</p> <p>1 actually referring to the Commitment Form. So now</p> <p>2 when we put together Commitment Forms, we put them</p> <p>3 together as MOUs. And we had made that transition</p> <p>4 during this time frame, and I mistakenly referred to</p> <p>5 the Commitment Form as the MOU.</p> <p>6 Q So what you were referring to was the Commitment</p> <p>7 Form that was executed dated May 4, 2010, and has</p> <p>8 been marked as Exhibit 3; correct?</p> <p>9 A That's correct.</p> <p>10 Q Where in Exhibit 3, the Commitment Form, does it</p> <p>11 state that Pengo would retain the 3D drawings and</p> <p>12 tooling?</p> <p>13 A It is not stated in the Commitment Form.</p> <p>14 Q So that was another error in your letter?</p> <p>15 A That was another error on my part, yes.</p> <p>16 Q You go on in what would be -- according to my --</p> <p>17 well, it's the last paragraph on that page, Pengo</p> <p>18 1339. You state, "Pengo was given the rights to</p> <p>19 manufacture these castings exclusively for sale to</p> <p>20 Harleman Manufacturing." Are you, again, referring</p> <p>21 to the Commitment Form when you say that?</p> <p>22 A Yes.</p> <p>23 Q Where in the Commitment Form does it say that Pengo</p> <p>24 will have the exclusive right to manufacture these</p> <p>25 castings?</p>	<p style="text-align: right;">100</p> <p>1 was?</p> <p>2 Q Yes.</p> <p>3 A That was our understanding, yes.</p> <p>4 Q But again, that's not contained in the Commitment</p> <p>5 Form?</p> <p>6 A That's correct.</p> <p>7 Q And then in the first paragraph on page 1340,</p> <p>8 Exhibit 67, in the first paragraph, you state, "In</p> <p>9 communicating with our Laurens office on 2/10/2011,</p> <p>10 you indicated that had received other samples in</p> <p>11 from another source which further complicates the</p> <p>12 situation as we are unsure of your commitment, and</p> <p>13 these actions clearly are in direct conflict with</p> <p>14 the agreement." How are they in direct conflict</p> <p>15 with the agreement, assuming that occurred?</p> <p>16 A It's based on the standpoint of the agreement we had</p> <p>17 to put the engineering hours into the reverse</p> <p>18 engineering side of it. And then the signed</p> <p>19 Commitment Form by both parties to be able to</p> <p>20 manufacture and produce cast heads.</p> <p>21 Q And you go on in the next sentence to state your</p> <p>22 position or the company's position that Pengo, being</p> <p>23 the exclusive supplier and Harleman being the</p> <p>24 exclusive buyer; correct?</p> <p>25 A Correct.</p>

<p style="text-align: right;">101</p> <p>1 Q And you go on in the last paragraph to state that if</p> <p>2 Harleman terminates the project or confirms that</p> <p>3 Harleman has already developed with another supplier</p> <p>4 outside our agreement, then all tooling development</p> <p>5 charges will be forfeit on this project. Is that</p> <p>6 stated anywhere in the Commitment Form?</p> <p>7 A No, it is not.</p> <p>8 Q And then you go on to state, "Pengo will also seek</p> <p>9 reimbursement for the engineering hours that we will</p> <p>10 not be able to recover as a result of Harleman's</p> <p>11 decision to terminate the project before any</p> <p>12 production orders." And that's not a true statement</p> <p>13 either, is it?</p> <p>14 A Well, we were certainly going to lose everything</p> <p>15 from an engineering standpoint because there's no</p> <p>16 products that we can use because they're of the</p> <p>17 Harleman design. But we had received some</p> <p>18 production orders at the time this was written --</p> <p>19 which the letter was also written because we had</p> <p>20 other samples in -- I believe it was in December and</p> <p>21 had still not gotten approval back, and we were also</p> <p>22 trying to get approval on that to be able to proceed</p> <p>23 with those series of heads.</p> <p>24 Q Do you recall which samples those were?</p> <p>25 A I do not. I'd have to verify.</p>	<p style="text-align: right;">103</p> <p>1 decided to move forward; is that correct?</p> <p>2 A That's correct.</p> <p>3 (Exhibit 68 was marked for</p> <p>4 identification.)</p> <p>5 Q (By Mr. Harris) Exhibit 68, I think, is your e-mail</p> <p>6 to your folks at Pengo, summarizing your</p> <p>7 conversation with Mr. Harleman; is that correct?</p> <p>8 A Correct.</p> <p>9 Q And then he sent in a new PO for a revised cost for</p> <p>10 product and tooling?</p> <p>11 A Correct.</p> <p>12 Q And you state that you need to expedite -- or</p> <p>13 expedite the purchase order for the heads and the</p> <p>14 samples for the multiplane heads?</p> <p>15 A Correct.</p> <p>16 Q And you would agree, as we sit here on March 10th</p> <p>17 of 2011, the purchase order that had been submitted</p> <p>18 December 20th, 2010, no action had been taken to</p> <p>19 build those heads at this point?</p> <p>20 A What product was the purchase order for?</p> <p>21 Q The single cuts.</p> <p>22 A To my knowledge, that order was being processed.</p> <p>23 Q All right. And you want all information funneled to</p> <p>24 you because you're going to give Mr. Harleman weekly</p> <p>25 updates?</p>
<p style="text-align: right;">102</p> <p>1 Q Did Mr. Harleman ever contact you regarding this</p> <p>2 letter?</p> <p>3 A I am -- I'm not sure.</p> <p>4 Q Other than looking at your Outlook calendar, did you</p> <p>5 find any documents or records that confirmed this</p> <p>6 conference call in August of 2010?</p> <p>7 A No.</p> <p>8 Q What changes had Harleman requested to the samples</p> <p>9 that seriously affected the time line to get the</p> <p>10 parts into production?</p> <p>11 A They wanted to add the logo and the part number and</p> <p>12 the patent number as well as increase the tooth</p> <p>13 holder size from inch and a quarter to inch and a</p> <p>14 half.</p> <p>15 Q You would agree the adding of the part number and</p> <p>16 the logo and the patent number, those would be minor</p> <p>17 revisions?</p> <p>18 A Well, when you're talking about casting patterns,</p> <p>19 there really is no minor revisions.</p> <p>20 Q Do you recall how much it would cost to make those</p> <p>21 tooling changes?</p> <p>22 A I don't recall, but it's in one of the earlier</p> <p>23 exhibits we looked at.</p> <p>24 Q And you would -- after you sent this letter, you</p> <p>25 talked to Mr. Harleman, and I believe the parties</p>	<p style="text-align: right;">104</p> <p>1 A I actually had it set up for Jim to give him weekly</p> <p>2 updates. I just wanted to make sure that I was</p> <p>3 copied on all the information so I knew everything</p> <p>4 that was going on with the Harleman project.</p> <p>5 Q Do you know did Mr. Tomlen provide those weekly</p> <p>6 updates?</p> <p>7 A He did, yes.</p> <p>8 (Exhibit 69 was marked for</p> <p>9 identification.)</p> <p>10 Q (By Mr. Harris) I'll hand you Exhibit 69, which is</p> <p>11 an e-mail at the bottom from Mr. Harleman dated</p> <p>12 March 21st, 2011. He's asking for a verification</p> <p>13 report on the purchase order that he had sent in</p> <p>14 along with delivery dates; correct?</p> <p>15 A That's correct.</p> <p>16 Q Do you know why it had taken eleven days from your</p> <p>17 e-mail of March 10th to get a verification report?</p> <p>18 A I would have to confirm what day we received the</p> <p>19 purchase order.</p> <p>20 (Exhibit 70 was marked for</p> <p>21 identification.)</p> <p>22 Q (By Mr. Harris) I'll show you what we've marked as</p> <p>23 Exhibit 70. That's an e-mail from Harleman</p> <p>24 Manufacturing to Ms. Jamison dated March 11th,</p> <p>25 2011, with a purchase order attached labeled</p>

<p style="text-align: right;">105</p> <p>1 Pengo 1388 through 1391. You would agree with me</p> <p>2 that that purchase order was submitted to Pengo</p> <p>3 shortly after noon on March the 11th?</p> <p>4 A That's correct.</p> <p>5 Q Okay. Do you know why it took ten days to get a</p> <p>6 verification of that purchase order? Or perhaps let</p> <p>7 me rephrase the question. Do you know why after the</p> <p>8 passage of ten days Mr. Harleman had still not</p> <p>9 gotten a verification of the purchase order?</p> <p>10 A I know that we were waiting on some information to</p> <p>11 come back from China on processing, which seven to</p> <p>12 ten days is not too uncommon for bringing products</p> <p>13 in.</p> <p>14 And then we also had a conference that Brian</p> <p>15 wanted to schedule to discuss the Harleman</p> <p>16 situation. So if you refer back to my 68 -- or</p> <p>17 Exhibit 68 and, you know, my comments there that</p> <p>18 were made about "we'll give it one more try."</p> <p>19 Because it was a very volatile situation, kind of on</p> <p>20 again, off again, in several heated conversations</p> <p>21 between myself and others at Pengo and with</p> <p>22 Ron Harleman.</p> <p>23 Q Well, were those after the March 10th e-mail?</p> <p>24 A "Those" being?</p> <p>25 Q Those heated conversations with Mr. Harleman that</p>	<p style="text-align: right;">107</p> <p>1 the tooling cost for those heads. This is not a</p> <p>2 purchase order for cast heads.</p> <p>3 Q So there wasn't anything to get from China as far as</p> <p>4 production time or anything like that?</p> <p>5 A Not for this purchase order here, no.</p> <p>6 MR. SPERLING: When you're through with this,</p> <p>7 before you move on to your next exhibit, let's take</p> <p>8 a short break.</p> <p>9 MR. HARRIS: Okay. Go ahead, if you're ready?</p> <p>10 MR. SPERLING: Are you --</p> <p>11 MR. HARRIS: Yeah, that's fine.</p> <p>12 THE VIDEOGRAPHER: Okay. We're off the record.</p> <p>13 (Short break taken.)</p> <p>14 (Exhibit 71 was marked for</p> <p>15 identification.)</p> <p>16 THE VIDEOGRAPHER: We're back on the record.</p> <p>17 Q (By Mr. Harris) All right. Mr. Scudder, before we</p> <p>18 took the break, we were talking about the delay in</p> <p>19 the issuance of an order verification for Harleman's</p> <p>20 March 21st -- I'm sorry -- yes, March 11th,</p> <p>21 2011, purchase order. I'll show you now Exhibit 71.</p> <p>22 And the bottom of that is an e-mail from Mr. Tomlen</p> <p>23 to Mr. Harleman March 21st, 2011, filed 11 p.m.;</p> <p>24 correct?</p> <p>25 A Correct.</p>
<p style="text-align: right;">106</p> <p>1 you say occurred?</p> <p>2 A It would have been during that 2010 through this</p> <p>3 2011 time frame.</p> <p>4 Q So was there -- there a -- I mean, what you're</p> <p>5 saying is before you would send out the verification</p> <p>6 of the purchase order, you wanted to talk with</p> <p>7 Mr. Rickards?</p> <p>8 A That's correct.</p> <p>9 Q Even though you'd sent Mr. Harleman a letter and</p> <p>10 talked with him and said if you send in a purchase</p> <p>11 order, we'll do this?</p> <p>12 A That's correct.</p> <p>13 Q And that purchase order -- those are for the</p> <p>14 multiplane heads; correct?</p> <p>15 A The purchase order dated 3/11?</p> <p>16 Q Yes.</p> <p>17 A That's correct.</p> <p>18 Q The ones that he's not even seen accurate samples</p> <p>19 for?</p> <p>20 A Correct. And also the ones that he's requested</p> <p>21 additional changes on.</p> <p>22 Q And as of that date, March 21st, 2011, the</p> <p>23 purchase order had not even been sent to GST for</p> <p>24 pricing, had it?</p> <p>25 A Actually, this purchase order dated 3/11 is only for</p>	<p style="text-align: right;">108</p> <p>1 Q And he's talking about a -- summarizing a phone</p> <p>2 conversation that he and Mr. Harleman had; correct?</p> <p>3 A Correct.</p> <p>4 Q And then further down he talks about "regarding the</p> <p>5 multiplane heads." It states, "Eric Matthias will</p> <p>6 be assigning part numbers to these items and will</p> <p>7 then send to GST for pricing. We should be able to</p> <p>8 advise you of the revised pricing by April 18th."</p> <p>9 Why was there any need for revised pricing?</p> <p>10 A Because of the changes requested on the part number</p> <p>11 and the patent number.</p> <p>12 Q How would adding the part number and the patent</p> <p>13 number increase the cost of producing the multiplane</p> <p>14 head?</p> <p>15 A We would have to produce a pattern insert in order</p> <p>16 to be able to cast those part numbers and patent</p> <p>17 numbers onto the head itself.</p> <p>18 Q And that's what the tooling charge was for; correct?</p> <p>19 A That's correct.</p> <p>20 Q And then samples are going to be produced of the</p> <p>21 multiplane. Is that how you understand his e-mail?</p> <p>22 A That's correct.</p> <p>23 (Exhibit 72 was marked for</p> <p>24 identification.)</p> <p>25 Q (By Mr. Harris) Now, I've marked as Exhibit 72 an</p>

<p style="text-align: right;">109</p> <p>1 e-mail labeled Pengo 1506. That's an e-mail from</p> <p>2 Phillip?</p> <p>3 A Zhou.</p> <p>4 Q And Mr. Zhou is the one at GST; is that correct?</p> <p>5 A That is correct.</p> <p>6 Q And in this e-mail, he's stating that the single cut</p> <p>7 heads are conditionally approved for production;</p> <p>8 correct?</p> <p>9 A Correct.</p> <p>10 Q So this is related to the purchase order that was</p> <p>11 submitted back on December 20 of 2010; is that</p> <p>12 right?</p> <p>13 A That's correct.</p> <p>14 Q Do you recall e-mailing to Mr. Rickards,</p> <p>15 Mr. Matthias, a gentleman named John Rick, R-i-c-k;</p> <p>16 is that correct?</p> <p>17 A Ricke.</p> <p>18 Q John Ricke and Robert Frost the Harleman patent in</p> <p>19 preparation for a conference call?</p> <p>20 A I do, yes.</p> <p>21 Q What was the purpose -- well, first of all, who's</p> <p>22 Mr. Ricke?</p> <p>23 A He is our controller.</p> <p>24 Q What --</p> <p>25 A Pengo's controller.</p>	<p style="text-align: right;">111</p> <p>1 dated April 12th, 2011; correct?</p> <p>2 A That's correct.</p> <p>3 Q And he states, It has now been thirty days ago that</p> <p>4 we issued purchase order or PO No. RH03152011. And</p> <p>5 longer for PO No. LS03042013 with no updates of</p> <p>6 value and no other verification report. Now, that</p> <p>7 first -- I'm sorry. The second purchase order that</p> <p>8 he refers to is the one that was sent to Pengo on</p> <p>9 March 11th of 2011 and marked as Exhibit 70;</p> <p>10 correct?</p> <p>11 A Is that referencing PO LS?</p> <p>12 Q Yes, where it says PO No. LS03042013.</p> <p>13 A Correct. And that's the purchase order for the</p> <p>14 tooling. There's --</p> <p>15 Q Correct.</p> <p>16 A There's no -- there's no verification. It's a PO to</p> <p>17 change the tooling. We would make the change on the</p> <p>18 tooling and that would be it. So there's nothing to</p> <p>19 deliver on this PO or verify or...</p> <p>20 Q And the other purchase order, is that the one that</p> <p>21 was sent to Pengo back in December of 2010? I</p> <p>22 believe it is Exhibit 63.</p> <p>23 A No, it is not that purchase order.</p> <p>24 Q Do you know which purchase order that is?</p> <p>25 A I do -- I'd have to see the purchase order. I don't</p>
<p style="text-align: right;">110</p> <p>1 Q What was the purpose of that conference call?</p> <p>2 A I'm not sure.</p> <p>3 Q What was the purpose of looking at Mr. Harleman's</p> <p>4 patent?</p> <p>5 A As I stated earlier, I wanted to see what the patent</p> <p>6 evolved around.</p> <p>7 Q Well, but you did that at the beginning of the</p> <p>8 process, didn't you?</p> <p>9 A I'm not sure of the time frame. At some point I</p> <p>10 wanted to know what the patent was about, and I got</p> <p>11 online and pulled up a copy, and I read it.</p> <p>12 Q But you don't have any recollection why you</p> <p>13 circulated the patent to them?</p> <p>14 A I don't remember the topic of that particular</p> <p>15 meeting that we were having, but certainly it was</p> <p>16 something to do with Harleman, but I don't recall</p> <p>17 specifically what the nature of the call was about.</p> <p>18 Q That came three days after you'd received another</p> <p>19 e-mail from Mr. Harleman, didn't it?</p> <p>20 (Exhibit 73 was marked for</p> <p>21 identification.)</p> <p>22 A Not sure on the time frame.</p> <p>23 Q (By Mr. Harris) All right. Well, let me show you</p> <p>24 Exhibit 73. That's an e-mail from Mr. Harleman to</p> <p>25 Dawn Jamison, Mr. Rickards, you, and Jim Tomlen,</p>	<p style="text-align: right;">112</p> <p>1 know.</p> <p>2 Q So it's -- there's no verification needed, you're</p> <p>3 saying, for tooling changes?</p> <p>4 A Correct.</p> <p>5 Q You agree with me that there had been no updates of</p> <p>6 value. Do you know what he's referring to there?</p> <p>7 A I do not. I cannot speak to value.</p> <p>8 Q And in this e-mail, Mr. Harleman threatens that</p> <p>9 Harleman Manufacturing will be forced to take legal</p> <p>10 action if the same delays are experienced this time</p> <p>11 around; correct?</p> <p>12 A That's what is stated.</p> <p>13 Q Now, then three days after that, you asked -- or you</p> <p>14 want to have a conference call to look at</p> <p>15 Mr. Harleman's patent. Does that help refresh your</p> <p>16 recollection as to why you were wanting to look at</p> <p>17 Mr. Harleman's patent?</p> <p>18 A No.</p> <p>19 Q We're now almost a year since the Commitment Form</p> <p>20 was signed, and Mr. Harleman still doesn't have any</p> <p>21 cast heads; true?</p> <p>22 A Production cast heads.</p> <p>23 Q Right. Heads that he could use in his business to</p> <p>24 sell augers to other customers; correct?</p> <p>25 A Correct.</p>

<p style="text-align: right;">113</p> <p>1 Q And you would agree with me that on May 4th, 2011,</p> <p>2 Mr. Rickards made the decision to terminate the</p> <p>3 agreement with Harleman Manufacturing?</p> <p>4 A I would agree the decision was made on or about that</p> <p>5 date.</p> <p>6 Q Why was that decision made?</p> <p>7 A We had to make a business decision, and based on the</p> <p>8 events that had taken place, we ultimately made the</p> <p>9 decision to cancel the commitment agreement --</p> <p>10 Commitment Form agreement.</p> <p>11 Q And which events were those that prompted the</p> <p>12 decision to terminate the agreement?</p> <p>13 A There were several key events that took place</p> <p>14 throughout the process. There were some very</p> <p>15 volatile phone calls. There was a lot of strong</p> <p>16 language that was used. There was actually some</p> <p>17 threats that were relayed to some of our</p> <p>18 salespeople.</p> <p>19 And, you know, through the process and through</p> <p>20 all the issues that we went through from that</p> <p>21 December to March time frame in trying to get those</p> <p>22 other samples approved to be able to keep the</p> <p>23 project moving and keep things rolling, we</p> <p>24 ultimately finally made the decision that it was</p> <p>25 just in the best interest to cancel the agreement,</p>	<p style="text-align: right;">115</p> <p>1 Pengo made the decision to terminate the Harleman</p> <p>2 agreement, I believe it was you who raised an issue</p> <p>3 about Mr. Harleman not buying all of the flights or</p> <p>4 something from Pengo that he said he was going to</p> <p>5 buy?</p> <p>6 A That's correct.</p> <p>7 Q And that was pursuant to a document dated</p> <p>8 November 13th, 2007, that was signed; is that</p> <p>9 right?</p> <p>10 A I'm not sure of the date, but I'm familiar with the</p> <p>11 document.</p> <p>12 Q What was -- what was the issue regarding the flights</p> <p>13 that you were bringing attention to?</p> <p>14 A The issue was that we -- when we put the flight</p> <p>15 agreement together, we agreed to keep certain</p> <p>16 levels, sizes and styles of flight in stock that</p> <p>17 were flights specifically for Harleman's</p> <p>18 specifications. So when we were getting ready to</p> <p>19 terminate the agreement, we wanted to be able to</p> <p>20 move that flight since we didn't have any other use</p> <p>21 for it other than Harleman.</p> <p>22 Q And Mr. Harleman informed Pengo that as soon as</p> <p>23 Pengo would provide the heads, he would take the</p> <p>24 flight?</p> <p>25 A I'm not aware of that, no.</p>
<p style="text-align: right;">114</p> <p>1 the Commitment Form agreement.</p> <p>2 Q Now, Mr. Harleman never made any threats to you, did</p> <p>3 he?</p> <p>4 A Not to me, no.</p> <p>5 Q I think what you're referring to is Jim Tomlen sent</p> <p>6 an e-mail that said something to the effect of</p> <p>7 Mr. Harleman might just come whip your and</p> <p>8 Brian Rickards' ass?</p> <p>9 A That's correct.</p> <p>10 Q You didn't take that seriously, did you?</p> <p>11 A I didn't disregard it.</p> <p>12 Q Well, would you agree with me that at the time that</p> <p>13 statement was made, Mr. Harleman had reason to be</p> <p>14 frustrated?</p> <p>15 A I would agree with that, yes.</p> <p>16 Q And in your business, having been in sales for</p> <p>17 years, you've seen people make statements when</p> <p>18 they're frustrated that they don't really mean,</p> <p>19 haven't you?</p> <p>20 A I've seen it both ways.</p> <p>21 Q You would agree with me that as of the date that</p> <p>22 Mr. Rickards terminated the agreement, not a single</p> <p>23 production head had been given to Harleman?</p> <p>24 A I believe that's correct.</p> <p>25 Q Now, after Harleman made -- or excuse me, after</p>	<p style="text-align: right;">116</p> <p>1 Q Do you know whether or not Mr. Harleman ever</p> <p>2 purchased all of the flight that he was saying he</p> <p>3 was going purchase?</p> <p>4 A Can you say that again, please.</p> <p>5 Q Yes. Did Harleman Manufacturing ultimately purchase</p> <p>6 all of the flight that it said it was going to</p> <p>7 purchase pursuant to that agreement?</p> <p>8 A Not to my knowledge, no.</p> <p>9 (Exhibit 74 was marked for</p> <p>10 identification.)</p> <p>11 Q (By Mr. Harris) We'll mark as Exhibit 74 this</p> <p>12 document labeled Pengo 1708. And I'll ask you, is</p> <p>13 that the flight agreement?</p> <p>14 A That's correct.</p> <p>15 Q And Ms. Jamison looked at that issue, didn't she?</p> <p>16 (Exhibit 75 was marked for</p> <p>17 identification.)</p> <p>18 A Looked at what issue?</p> <p>19 Q (By Mr. Harris) To see whether or not Mr. Harleman</p> <p>20 had fulfilled his requirements under that agreement?</p> <p>21 A I'm not sure who initiated it, but I was given --</p> <p>22 excuse me -- given a phone call or sent an e-mail</p> <p>23 stating that we had approximately between 5,000 and</p> <p>24 \$6,000 worth of flight on the ground that was built</p> <p>25 to Harleman's specifications in March of 2011.</p>

<p style="text-align: right;">117</p> <p>1 Q I'll show you e-mail marked Exhibit 75. It's</p> <p>2 labeled Pengo 2055. That's an e-mail from</p> <p>3 Dawn Jamison to Mary Pohlman, and it states,</p> <p>4 "Harleman order history on blanket order flight";</p> <p>5 correct?</p> <p>6 A Correct.</p> <p>7 Q And she states, Question, "Are the orders with no PO</p> <p>8 part of the blanket?" And then it says, "From</p> <p>9 looking at this history, it looks like the terms of</p> <p>10 agreement were fulfilled. After the quantity was</p> <p>11 taken, more orders were entered." So based upon</p> <p>12 Ms. Jamison's review, Mr. Harleman's company had</p> <p>13 fulfilled its requirements or terms of the</p> <p>14 agreement, whatever you want to call it, regarding</p> <p>15 flight; true?</p> <p>16 A That would be her opinion.</p> <p>17 Q Now, is it your opinion that that agreement,</p> <p>18 Exhibit 74, that went on forever?</p> <p>19 A It -- it did not go on forever.</p> <p>20 Q It was just until he bought those quantities; right?</p> <p>21 A Or worked with a product manager to replenish</p> <p>22 those -- those quantities. We built these</p> <p>23 quantities several times.</p> <p>24 So if you go up -- up to Item No. 3, for</p> <p>25 example, in this agreement, where it states, "Pengo</p>	<p style="text-align: right;">119</p> <p>1 Manufacturing when they came in?</p> <p>2 A Yes, they were.</p> <p>3 Q And he paid through -- or he paid for all heads that</p> <p>4 he had received up through, I think, March 20th of</p> <p>5 2012; is that right?</p> <p>6 A I would have to confirm that. I couldn't verify on</p> <p>7 what was or wasn't paid for.</p> <p>8 Q And, in fact, Harleman placed some additional orders</p> <p>9 in that 180-day window; correct?</p> <p>10 A That's correct.</p> <p>11 Q And I've tried to follow the train or the trail,</p> <p>12 whatever you want to call all the e-mails, and it's</p> <p>13 a little hard to keep together, but my question</p> <p>14 ultimately is: Are there still Harleman heads at</p> <p>15 Pengo?</p> <p>16 A Not to my knowledge.</p> <p>17 Q And I think from looking at all the documents, the</p> <p>18 only issue was there was an invoice for a shipment</p> <p>19 for approximately \$41,000 of heads that did not get</p> <p>20 paid; is that right?</p> <p>21 A That sounds like the number in that range.</p> <p>22 Q And the dispute there was over whether or not there</p> <p>23 was going to be a credit for the \$43,000 Harleman</p> <p>24 paid for the tooling and that type of thing, wasn't</p> <p>25 there?</p>
<p style="text-align: right;">118</p> <p>1 will have quoted quantity" -- which is what's down</p> <p>2 below -- "in stock to ship and replace after</p> <p>3 shipment." So if we had a hundred of the 9-inch</p> <p>4 flights in stock, and they ordered a hundred, we</p> <p>5 would immediately build a hundred more and put them</p> <p>6 on the shelf ready to go for the next time.</p> <p>7 So while Dawn is semi-correct in fulfilling the</p> <p>8 commitment to the chart, we still had flight left</p> <p>9 over, which is what I illustrated in the layout that</p> <p>10 we wanted Harleman to take at the end -- in March of</p> <p>11 2011.</p> <p>12 Q And you said it was like -- your belief, was it five</p> <p>13 or \$6,000, something along that line?</p> <p>14 A I think -- I'm for sure it was less than ten, and I</p> <p>15 want to say it was like five or six.</p> <p>16 Q Now, after Mr. Rickards made the decision to</p> <p>17 terminate the agreement pursuant to the terms of the</p> <p>18 agreement, there was a 180-day window; correct?</p> <p>19 A There was a 180-day window in the Commitment Form,</p> <p>20 and we mistakenly listed that as 90 days.</p> <p>21 Q But my point in asking the question is heads came in</p> <p>22 after Mr. Rickards made the decision to terminate?</p> <p>23 A That's correct.</p> <p>24 Q I -- well, strike that. Let me start over..</p> <p>25 Were those heads shipped to Harleman</p>	<p style="text-align: right;">120</p> <p>1 A That's correct.</p> <p>2 Q And that -- from looking at the documents, you</p> <p>3 really weren't involved in those negotiations. That</p> <p>4 was between Mr. Rickards and Mr. Harleman's</p> <p>5 attorney; is that right?</p> <p>6 A It was between our -- yeah, two sets of attorneys,</p> <p>7 between Pengo and Harleman.</p> <p>8 Q Were there any -- do you know were the new sample</p> <p>9 heads for the multiplane auger heads ever built?</p> <p>10 A Not to my knowledge, no.</p> <p>11 Q Why was that?</p> <p>12 A Because of the termination of the agreement.</p> <p>13 Q Now, there was also an issue about whether or not</p> <p>14 the tooling was going to be returned, and the</p> <p>15 foundry in China returned that tooling to Pengo in</p> <p>16 Iowa; correct?</p> <p>17 A That's correct.</p> <p>18 Q To your knowledge, is that tooling still at Pengo?</p> <p>19 A Yes, it is.</p> <p>20 Q Now, after the agreement was terminated in May of</p> <p>21 2011, do you recall receiving some communication</p> <p>22 from Mr. Harleman about some foundry in China</p> <p>23 selling Harleman auger heads?</p> <p>24 A I became aware of that situation. I can't remember</p> <p>25 exactly how I became aware of that.</p>

<p style="text-align: right;">121</p> <p>1 Q Were you involved in investigating that at all?</p> <p>2 A I was involved in the discussions and the process.</p> <p>3 Q What do you recall being discussed about that?</p> <p>4 A A, as a company, we discussed how concerned we were</p> <p>5 about that problem, and we took it very, very</p> <p>6 seriously and actually got in contact with the</p> <p>7 supplier and found out that there had been some</p> <p>8 infringements and activities on their part and that</p> <p>9 that employee was terminated and let go. And we</p> <p>10 made it clear to the owner of the company that they</p> <p>11 were not to use our products or anybody else's</p> <p>12 products in that nature whatsoever.</p> <p>13 Q You would agree with me that that was a violation of</p> <p>14 the agreement that Pengo had with the supplier?</p> <p>15 A I would agree a hundred percent with that.</p> <p>16 Q And that was also not consistent with the terms of</p> <p>17 the confidentiality agreement that Pengo executed</p> <p>18 with Harleman?</p> <p>19 MR. SPERLING: What is it that you are asking</p> <p>20 whether it was consistent or not with the</p> <p>21 confidentiality agreement?</p> <p>22 Q (By Mr. Harris) The fact that a Chinese supplier was</p> <p>23 offering Harleman heads for sale.</p> <p>24 A Well, the Pengo confidentiality agreement says that</p> <p>25 we will not release any private information, which</p>	<p style="text-align: right;">123</p> <p>1 built for Blattner Energy?</p> <p>2 A Yes, it is.</p> <p>3 Q And Blattner energy asked Pengo to copy a design for</p> <p>4 that auger head; correct?</p> <p>5 A No, that's not correct. Blattner Energy sent me</p> <p>6 some pictures of a Hartfuss auger and said they</p> <p>7 wanted something built similar to the Hartfuss</p> <p>8 design.</p> <p>9 Q And the Hartfuss is a European auger?</p> <p>10 A That's correct.</p> <p>11 Q Did you make any investigation to determine whether</p> <p>12 or not the Hartfuss auger head had taken aspects of</p> <p>13 the Harleman auger head and used them?</p> <p>14 A No, and wasn't concerned about that.</p> <p>15 Q Why?</p> <p>16 A Because what we did is took our standard spiral</p> <p>17 design, and the only variation to this than our</p> <p>18 standard spiral auger is the pockets, which the</p> <p>19 teeth are mounted in. As you can see on Hartfuss,</p> <p>20 they mount on top of the flight, and we moved those</p> <p>21 up to mount on top of the flight just like the</p> <p>22 Hartfuss. But the design pattern and the cup</p> <p>23 pattern is our standard spiral that we've built for</p> <p>24 many, many years.</p> <p>25 Q But the placement of those pilots is the same as the</p>
<p style="text-align: right;">122</p> <p>1 we did not do.</p> <p>2 Q And it also says that you'll make sure that your</p> <p>3 suppliers don't do that as well; true?</p> <p>4 MR. SPERLING: I object to the character --</p> <p>5 A I'd have to --</p> <p>6 MR. SPERLING: I object to the characterization</p> <p>7 of the terms of the agreement.</p> <p>8 Q (By Mr. Harris) You can go ahead and answer.</p> <p>9 A I would have to read through it to see. I'm not</p> <p>10 sure how that language is structured as far as that</p> <p>11 goes. But I can tell you we took it very, very</p> <p>12 seriously and got right on top of that.</p> <p>13 Q And you agree, based upon your experience, that</p> <p>14 happens with some companies in China, doesn't it, as</p> <p>15 far as infringing upon patents and things of that</p> <p>16 nature?</p> <p>17 A It does happen, yes.</p> <p>18 Q Did Pengo ever incorporate any of the design aspects</p> <p>19 of the Harleman auger heads into any of its designs?</p> <p>20 A No.</p> <p>21 (Exhibit 76 was marked for</p> <p>22 identification.)</p> <p>23 Q (By Mr. Harris) I'll show you a picture that's</p> <p>24 marked Exhibit 76. I only got one. I apologize..</p> <p>25 Do you know is that a auger head that Pengo</p>	<p style="text-align: right;">124</p> <p>1 Pengo auger head, isn't it -- or I'm sorry, the</p> <p>2 Harleman auger head, isn't it?</p> <p>3 A Absolutely not.</p> <p>4 Q So it's your opinion that the teeth in the Harleman</p> <p>5 auger head are not mounted into the flight?</p> <p>6 A They are mounted on the flights, yes. But we all as</p> <p>7 a manufacturer mount them on the flights.</p> <p>8 Q Well, but, I mean, on this head they're notched into</p> <p>9 the flight, aren't they?</p> <p>10 A We notch them in on every flight. On this one, if</p> <p>11 this is the flight plane, the pocket would normally</p> <p>12 be like this. And on this one that we built, the</p> <p>13 pockets raised up a little bit on the top. It's the</p> <p>14 only variation. So the skew and tack angles on the</p> <p>15 carbide teeth would be the same as our standard</p> <p>16 spiral.</p> <p>17 MR. HARRIS: Okay. Let's take a break. I</p> <p>18 think we're close to being --</p> <p>19 THE VIDEOGRAPHER: Okay. We're off the record.</p> <p>20 (Short break taken.)</p> <p>21 THE VIDEOGRAPHER: We're back on the record.</p> <p>22 Q (By Mr. Harris) Mr. Scudder, the head that's</p> <p>23 reflected in Exhibit 76 that was built for Blattner</p> <p>24 Energy, do you know how many of those Pengo built?</p> <p>25 A How many spiral augers or how many augers?</p>

<p style="text-align: right;">125</p> <p>1 Q How many of the specific ones that it built for</p> <p>2 Blattner like this?</p> <p>3 A One spiral auger was built for Blattner Energy.</p> <p>4 Q That's it?</p> <p>5 A Yes.</p> <p>6 Q Did you build that specific auger for anyone else?</p> <p>7 A Not with the raised pockets like you see in the</p> <p>8 picture.</p> <p>9 Q Do you know when you built the auger reflected in</p> <p>10 Exhibit 76 for Blattner?</p> <p>11 A I don't recall the exact date it was built, no.</p> <p>12 Q Okay. Now, we talked about the single cut heads</p> <p>13 that were ordered by Harleman and the purchase order</p> <p>14 submitted December 20th, 2010. And those weren't</p> <p>15 delivered to Harleman until after the termination of</p> <p>16 the agreement. Do you recall what price Harleman</p> <p>17 was charged for those auger heads? Was it the</p> <p>18 original price in the Commitment Form or was it the</p> <p>19 subsequently revised price?</p> <p>20 A I do not recall.</p> <p>21 MR. HARRIS: I think that's all I got, subject</p> <p>22 to any follow-up after your attorney's done.</p> <p>23 EXAMINATION</p> <p>24 BY MR. SPERLING:</p> <p>25 Q Mr. Scudder, I have a few questions for you. You</p>	<p style="text-align: right;">127</p> <p>1 testified that you were unhappy that Pengo personnel</p> <p>2 were shown in the video. Do you remember that</p> <p>3 testimony?</p> <p>4 A I do, yes.</p> <p>5 Q Did you view the video as a fair comparison of the</p> <p>6 capabilities of comparable Pengo and Harleman</p> <p>7 augers?</p> <p>8 A No, because this was where we get back to talking</p> <p>9 about, you know, spiral augers, you know, double</p> <p>10 cut, double carry; double cut, single carry; single</p> <p>11 cut, double carry. All the different, you know,</p> <p>12 variations that, you know, one auger is designed to</p> <p>13 drill in these conditions and the other is designed</p> <p>14 to drill in these conditions. So to take one that's</p> <p>15 built this way and one that's built this way into a</p> <p>16 comparison, if, in fact, that's what you're going to</p> <p>17 do, clearly would not be a fair illustration of what</p> <p>18 those two products could do side by side.</p> <p>19 So an example of that would be the 72-inch</p> <p>20 auger that was built for Blattner. There's a lot of</p> <p>21 wear on this picture. And I actually went to this</p> <p>22 job site, and we actually built a 72-inch double</p> <p>23 cut, double carry and replaced this auger, which the</p> <p>24 auger performed magically, just increased their</p> <p>25 productivity, increased their drill time, because</p>
<p style="text-align: right;">126</p> <p>1 were asked some questions this afternoon about</p> <p>2 exclusivity and specifically whether you understood</p> <p>3 that the Commitment Form required Harleman to</p> <p>4 exclusively purchase castings from Pengo, and you</p> <p>5 said it was not required to do so. Do you recall</p> <p>6 that testimony?</p> <p>7 A I do, yes.</p> <p>8 Q I would like you to look again at Exhibit 67, which</p> <p>9 has attached to an e-mail a letter from you to</p> <p>10 Ron Harleman.</p> <p>11 A Okay.</p> <p>12 Q On the second page of that letter, you address your</p> <p>13 understanding that Harleman was obtaining samples</p> <p>14 from another source?</p> <p>15 A Correct.</p> <p>16 Q Why were you unhappy about that?</p> <p>17 A Because of the time, money, and effort that we had</p> <p>18 put into this project. This was specifically</p> <p>19 designed for parts and components that could only be</p> <p>20 sold to Harleman Manufacturing. So for them to seek</p> <p>21 out a second source meant that all of that time and</p> <p>22 effort could be for nothing. And that didn't seem</p> <p>23 fair, in my opinion, to be able to do that.</p> <p>24 Q You were also asked this afternoon about a video</p> <p>25 that Harleman created that you saw, and you</p>	<p style="text-align: right;">128</p> <p>1 they got the right tool into the right application.</p> <p>2 So in doing comparisons, you have to do the same</p> <p>3 thing.</p> <p>4 Q Had you understood that Mr. Harleman was going to do</p> <p>5 comparative drilling, would you have provided the</p> <p>6 Pengo auger that you provided?</p> <p>7 A No, I would not have.</p> <p>8 Q Finally, I'd like to ask you about your testimony</p> <p>9 earlier today about whether you treated Harleman</p> <p>10 Manufacturing in the way you would treat a standard</p> <p>11 customer. Did you?</p> <p>12 A Certainly not. I certainly spent a lot more time</p> <p>13 from my side being involved in the project and kept</p> <p>14 a lot of our key managers involved in the project</p> <p>15 being, you know, Jim Tomlen and Dawn Jamison.</p> <p>16 Typically we don't have five or six people on one</p> <p>17 account going through and trying to manage and do</p> <p>18 everything.</p> <p>19 Q Why did you do that?</p> <p>20 A Well, we have a company philosophy, and it's just do</p> <p>21 the right thing. And it was a way to -- to be able</p> <p>22 to resolve some of the issues and some of the</p> <p>23 problems that we were having and maintain a</p> <p>24 successful and satisfying relationship with a</p> <p>25 customer.</p>

<p style="text-align: right;">129</p> <p>1 MR. SPERLING: No further questions.</p> <p>2 MR. HARRIS: No questions.</p> <p>3 MR. SPERLING: We reserve the right to review</p> <p>4 the transcript.</p> <p>5 MR. HARRIS: Oh, sure.</p> <p>6 THE VIDEOGRAPHER: We're off the record.</p> <p>7 (Deposition concluded at 4:01 p.m.)</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">131</p> <p>1 REPORTER'S CERTIFICATE</p> <p>2</p> <p>3 STATE OF MISSOURI)</p> <p>4) ss</p> <p>5 COUNTY OF GREENE)</p> <p>6</p> <p>7 I, PAULA JOHNSON KAVANAGH, Certified Court</p> <p>8 Reporter, do hereby certify that the witness was</p> <p>9 duly sworn by me; that the facts stated by me in the</p> <p>10 caption hereof are true; that the said witness did</p> <p>11 make the above and foregoing answers in response to</p> <p>12 questions propounded as shown; that I did, in</p> <p>13 stenotype, report said proceedings; and that the</p> <p>14 above and foregoing typewritten pages contain a</p> <p>15 full, true, and correct transcription of my</p> <p>16 shorthand notes taken on such occasion. That</p> <p>17 presentment by me to the witness for signature was</p> <p>18 waived; that the deposition will be thereafter by</p> <p>19 the witness read over, signed, and sworn to on or</p> <p>20 before the date of trial; that said deposition is</p> <p>21 now herewith returned.</p> <p>22 I further certify that I am neither attorney</p> <p>23 for, nor counsel for, nor related to, nor employed</p> <p>24 by any of the parties to the action in which this</p> <p>25 deposition was taken; and, further, that I am not a</p> <p>relative or employee of any attorney or counsel</p> <p>employed by the parties hereto, or financially</p> <p>interested in the action.</p> <p>PAULA JOHNSON KAVANAGH</p> <p>CCR, RPR</p> <p>CCR No. 1222</p> <p>ALPHA REPORTING SERVICE</p> <p>3230-G South National</p> <p>Springfield, MO 65807</p> <p>417-887-4110</p>
<p style="text-align: right;">130</p> <p>1 DEPONENT'S SIGNATURE PAGE</p> <p>2</p> <p>3</p> <p>4 In Re. Harleman vs. Pengo</p> <p>6:14-cv-03498-MDH; USDC</p> <p>5</p> <p>6</p> <p>7 Taken. January 28, 2015</p> <p>8</p> <p>9 -----</p> <p>10</p> <p>11 DANA SCUDDER</p> <p>12</p> <p>13 Subscribed and sworn to before me this _____ day</p> <p>14 of _____, 2015.</p> <p>15</p> <p>16 _____</p> <p>17 Notary Public</p> <p>18</p> <p>19 My commission expires.</p> <p>20 _____</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	

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